Supreme Court, U.S.
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No. 02-

IN THE

# Supreme Court of the United States

IN RE HUMANA INC. MANAGED CARE LITIGATION

PACIFICARE HEALTH SYSTEMS, INC., *et al.*,
*Petitioners*,

v.

JEFFREY BOOK, D.O., *et al.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

**Whether a district court must compel arbitration of a plaintiff's RICO claims under a valid arbitration agreement even if that agreement does not allow an arbitrator to award punitive damages, leaving to the arbitrator in the first instance the decision of what remedies are available to the RICO plaintiff in arbitration.**

## PARTIES TO PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit were (a) plaintiffs-appellees Jeffrey Book, D.O., Dennis Breen, M.D., Michael Burgess, M.D., Edward L. Davis, D.O., Glenn L. Kelly, M.D., Manual Porth, M.D., and Charles B. Shane, M.D., and (b) defendants-appellants Foundation Health Systems, Inc., n/k/a Health Net, Inc., PacifiCare Health Systems, Inc., PacifiCare Operations, Inc., n/k/a PacifiCare Health Plan Administrators, Inc., The Prudential Insurance Company of America, UnitedHealth Group Incorporated, f/k/a United HealthCare Corporation, UnitedHealthcare, Inc. and WellPoint Health Networks Inc. This petition is being filed on behalf of PacifiCare Health Systems, Inc., PacifiCare Operations, Inc., UnitedHealth Group Incorporated, and UnitedHealthcare, Inc. No publicly held companies owns 10% or more of PacifiCare Health Systems, Inc. or UnitedHealth Group Incorporated. PacifiCare Operations, Inc., n/k/a PacifiCare Health Plan Administrators, Inc., is owned 100% by PacifiCare Health Systems, Inc., a publicly held company, and UnitedHealthcare, Inc. is owned 100% by United HealthCare Services, Inc., which in turn is owned 100% by UnitedHealth Group Incorporated, a publicly held company.



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## PETITION FOR WRIT OF CERTIORARI

Petitioners PacifiCare Health Systems, Inc., PacifiCare Operations, Inc., UnitedHealthcare, Inc. and UnitedHealth Group Incorporated respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *In re Humana Inc. Managed Care Litigation*.

### CITATION OF COURT OF APPEALS AND DISTRICT COURT OPINIONS

The opinion of the Court of Appeals is reported at 285 F.3d 971. App. 1. The order denying the petition for rehearing and rehearing *en banc* is unreported. App. 55. The first opinion of the District Court for the Southern District of Florida, which the Court of Appeals adopted as its opinion, is reported at 132 F. Supp.2d 989. App. 11. The second opinion of the District Court, which modified its first opinion in part, is reported at 143 F. Supp.2d 1371. App. 47.

### STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction over this petition pursuant to 28 U.S.C. §1254(1) because the petition asks the Court to issue a writ of certiorari to review a case in the United States Court of Appeals for the Eleventh Circuit. The Court of Appeals issued its decision on March 14, 2002 and denied a petition for rehearing or rehearing *en banc* on June 21, 2002. This petition is being filed with the Clerk of this Court within 90 days from the date of the denial of the petition for rehearing.

### FEDERAL STATUTES INVOLVED IN THIS CASE

This petition involves Sections 2 and 4 of the Federal Arbitration Act, 9 U.S.C. §1, *et seq*. ("FAA"), and Section

1964 of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961, *et seq*. ("RICO"). Those sections are set forth in full in the Appendix. App. 57. Section 2 of the FAA states in relevant part:

> A written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 4 of the FAA states in relevant part (with emphasis added):

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. … *The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed in arbitration in accordance with the terms of the agreement.* … If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. … *If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.*



Section 1964(c) of RICO states in relevant part:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains ….

## I. STATEMENT OF THE CASE.

On August 14, 2000, plaintiffs Dennis Breen, Jeffrey Book, Manual Porth and Glenn Kelly ("Plaintiffs"), along with several other individuals, filed a ten-count complaint against fifteen defendants, including PacifiCare Health Systems, Inc. and PacifiCare Operations, Inc. (collectively, "PacifiCare"), and UnitedHealthcare, Inc. and UnitedHealth Group Incorporated (collectively, "United"). Several of the counts in the complaint allege that PacifiCare and United violated various provisions of the RICO statute (or aided and abetted violations of that statute). The District Court had jurisdiction over the complaint pursuant to 28 U.S.C. §1331 because Plaintiffs' RICO claims arose under the laws of the United States.[1]

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[1] Plaintiffs' substantive causes of action were for violations of RICO, *see* 18 U.S.C. §1962(a) & (c), the Employee Retirement Income and Security Act ("ERISA"), *see* 29 U.S.C. §1132(a)(1) & (3), a federal

At all times relevant to the complaint, Drs. Breen and Book were bound by contract to arbitrate disputes with PacifiCare, and hence PacifiCare filed motions to compel Drs. Breen and Book to arbitrate their claims against PacifiCare. Likewise, Drs. Porth and Kelly also were bound by contract to arbitrate their disputes with United, so United filed a similar motion to compel Drs. Porth and Kelly to arbitrate their claims against United.[2]

On December 11, 2000 and April 26, 2001, the District Court ruled on PacifiCare and United's motions to compel. The District Court found that enforceable arbitration agreements existed between PacifiCare and Drs. Breen and Book as well as between United and Drs. Porth and Kelly. *See* 143 F. Supp.2d at 1375; 132 F. Supp.2d at 1000-01 & 1005. The District Court also held that those arbitration agreements required Plaintiffs to arbitrate at least some of their claims against PacifiCare and United. The District Court, however, stopped short of ordering Plaintiffs to arbitrate *all* of their claims against PacifiCare and United. In particular, the District Court held that Plaintiffs did not have to arbitrate their RICO claims because all of the relevant arbitration agreements limited the damages that an arbitrator could award in arbitration: Both PacifiCare agreements

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Medicare prompt-pay regulation, *see* 42 C.F.R. §417.500(a)(6), and various State prompt-pay statutes, as well as for breach of contract, *quantum meruit*, and unjust enrichment. Plaintiffs also included in their complaint causes of action for conspiring to violate RICO, *see* 18 U.S.C. §1962(d), and for aiding-and-abetting RICO violations (in alleged violation of 18 U.S.C. §2). Plaintiffs amended their complaint while PacifiCare and United's appeal was pending in the Court of Appeals. The amended complaint still includes all Plaintiffs, all defendants (including PacifiCare and United), and most of the causes of action (including all of the RICO causes of action) from the original complaint.

[2] Additional motions to compel arbitration were filed in the District Court, but they are not the subject of this petition.



stated that an "arbitrator shall have the power to grant all legal and equitable remedies and award compensatory damages provided by [State] law, except that punitive damages shall not be awarded," United's agreement with Kelly stated that "arbitrators … shall have no authority to award any punitive or exemplary damages," and United's agreement with Porth stated that "arbitrators … shall have no authority to award extracontractual damages of any kind, including punitive or exemplary damages." App. 60-63.

While none of these damages limitations expressly addressed RICO trebled damages, the District Court interpreted the limitations as prohibiting arbitrators from awarding Plaintiffs RICO trebled damages. *See* 132 F. Supp.2d at 1001. Such prohibitions, the District Court held, prevented Plaintiffs from obtaining meaningful relief on their RICO claims in arbitration, and thus Plaintiffs were not required to arbitrate their RICO claims against PacifiCare and United pursuant to the Court of Appeals' earlier decision in *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998).[3] Typical of the District Court's analysis was its discussion of the two arbitration agreements between PacifiCare and Dr. Breen:

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[3] The District Court also refused to compel arbitration of Drs. Porth and Kelly's ERISA and State prompt-pay statutory claims against United even though punitive or multiple damages is not a remedy available for either claim. The District Court did so, at least in part, because the relevant arbitration agreements required that arbitrations be commenced within a year after one party notifies the other in writing of a dispute. App. 62-63. The District Court incorrectly construed this notice requirement as altering the statute of limitations on Drs. Porth and Kelly's ERISA and prompt-pay claims, which the District Court held was impermissible and rendered the ERISA and prompt-pay claims inarbitrable. *See* 132 F. Supp.2d at 1000.

> Both arbitration agreements contain broad language indicating that the parties intended for "any controversy, dispute, or claim arising out of the agreement" to be arbitrated. However, both agreements prohibit the arbitrator from awarding punitive damages. Thus, we are faced with a potential *Paladino* situation, discussed earlier with the context of United's motion to compel arbitration (Section II(A)), where the plaintiff may not be able to obtain meaningful relief for allegations of statutory violations in an arbitration forum. ...
>
> Accordingly, the Court will not compel Dr. Breen to arbitrate his RICO claims against PacifiCare due to the arbitrator's inability to impose punitive (treble) damages. All other statutory and non-statutory claims shall be arbitrated, except for the conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies.

132 F. Supp. 2d at 1005.[4]

PacifiCare and United appealed the District Court's decisions to the Court of Appeals, which had jurisdiction over the appeals pursuant to 9 U.S.C. §16(a)(1).[5] In a

[4] As reflected in the quote in text, the District Court also held that Plaintiffs did not have to arbitrate their conspiracy and aiding-and-abetting claims against PacifiCare and United that "stem from contractual relationships with other managed care companies." 143 F. Supp.2d at 1375; 132 F. Supp.2d at 1007. The Court of Appeals affirmed this holding. *See* 285 F.3d at 974-977.

[5] The District Court denied in part PacifiCare's motion to compel Dr. Breen to arbitrate and United's motion to compel Drs. Porth and Kelly to arbitrate on December 11, 2000. PacifiCare filed its notice of appeal on January 5, 2001 and United filed its notice of appeal on January 9, 2001. Both notices were timely under Federal Rule of Appellate Procedure ("FRAP") 4(a)(1)(A). The District Court denied in part PacifiCare's motion to compel Dr. Book to arbitrate on April 26, 2001, and PacifiCare filed its notice of appeal on May 4, 2001. The notice was timely under FRAP 4(a)(1)(A). The Court of Appeals consolidated these appeals on July 10, 2001.



published opinion, the Court of Appeals affirmed the District Court's holding that Plaintiffs did not have to arbitrate their RICO claims because the relevant arbitration agreements did not allow arbitrators to award punitive damages. *See* 285 F.3d at 973-74. In so doing, the Court of Appeals expressly adopted the reasoning used by the District Court to reach its holding: "We affirm in its entirety the district court's order for the reasons set forth in its comprehensive opinion found at 132 F. Supp.2d 989 (S.D.Fla. 2000)." 285 F.3d at 973-74.

## II. REASONS FOR GRANTING PETITION.

The Court of Appeals' decision, especially when read in conjunction with its earlier decision in *Paladino v. Avnet Computer Technologies*, is crystal clear: A district court in the Eleventh Circuit is authorized to refuse to compel arbitration of any RICO cause of action if the relevant arbitration agreement does not allow an arbitrator to award punitive damages. That decision (a) patently conflicts with the law of the Eighth Circuit, (b) addresses an issue over which there is a deep split among the First, Third, Fifth, Eighth, Ninth and Eleventh Circuits, (c) cannot be reconciled with opinions from the First, Second, Third, Fifth and Eighth Circuits, and (d) undermines the critical role that the FAA plays in promoting alternative dispute resolution. The Court of Appeals' decision also addresses an issue closely related to the issue presented in *Howsam v. Dean Witter Reynolds, Inc.*, No. 01-800, which this Court will decide during the

October 2002 Term. For all of these reasons, the Court should grant this petition.

### A. The Court Of Appeals' Decision Conflicts With The Eighth Circuit's Decision In Larry's United Super, Inc. v. Werries.

The most obvious reason for the Court to grant this petition is that the Court of Appeals' decision is in undeniable and irreconcilable conflict with the decision of the United States Court of Appeals for the Eighth Circuit in *Larry's United Super, Inc. v. Werries*, 253 F.3d 1083 (8th Cir. 2001). The relevant factual and procedural settings of both appeals are in perfect parallel: As in this case, the *Werries* defendants moved to compel arbitration of the plaintiffs' RICO claims under the FAA because the parties were bound by arbitration agreements. Also as in this case, the District Court held that the plaintiffs did not have to arbitrate their RICO claims because the agreements at issue did not allow arbitrators to award punitive damages. *Compare Werries*, 253 F.3d at 1084-85 *with In re Humana*, 285 F.3d at 973-74 & n.3 *and In re Managed Care*, 132 F. Supp.2d at 1000-01 & 1005.

Based on these operative facts, the *Werries* Court reversed the judgment of the District Court and held that a plaintiff was required to arbitrate RICO claims even if the relevant arbitration agreement did not allow for the recovery of punitive damages – a conclusion that stands in diametric opposition to the Court of Appeals' decision here. More specifically, the *Werries* Court reasoned:

> At this juncture, our jurisdiction extends only to determine whether a valid agreement to arbitrate exists, not to determine whether public policy



> conflicts with the remedies provided in the arbitration clause. There exists a valid agreement to arbitrate the RICO claims in this case, and the Supreme Court in [*Shearson/Am. Express, Inc. v.*] *McMahon*[, 482 U.S. 220 (1987)] has already determined that RICO claims are arbitrable, 482 U.S. at 242, 107 S.Ct. 2332; thus, there exists no "legal constraints external to the parties' agreement foreclos[ing] the arbitration" of this RICO dispute. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). Whether a prospective waiver of punitive damages violates the public policy underlying RICO's treble damages provision is a matter for the arbitrators in the first instance when fashioning an appropriate remedy if a RICO claim is proven to the arbitrators' satisfaction, and we express no views on the issue at this time. We are limited to determining whether the matter is arbitrable. We hold that it is.

253 F.3d at 1086.

The Court of Appeals' decision and the *Werries* decision cannot both be correct: Either the FAA requires district courts to compel arbitration of RICO claims under arbitration agreements that prohibit punitive damages (as is the law in the Eighth Circuit under *Werries*) or it does not (as is the law in the Eleventh Circuit under *In re Humana*). This Court should intercede to resolve this otherwise irreconcilable conflict.

**B. The Court Of Appeals' Decision Addresses An Issue Over Which There Is A Split Among The First, Third, Fifth, Eighth, Ninth and Eleventh Circuits.**

The specific and direct conflict between the Court of Appeals' decision and *Werries* reflects a deeper and more general conflict among the Courts of Appeals. A fundamental premise of the Court of Appeals' decision is that it is for a district court to determine, before ordering arbitration, whether a limitation on remedies contained within an arbitration agreement is valid. If the district court determines that it is not, the district court simply refuses to order arbitration, and the matter never reaches an arbitrator. *See* 285 F.3d at 973-74; 132 F. Supp.2d at 1005. This premise is well established in the Eleventh Circuit, *see Paladino*, 134 F.3d at 1062, and is also an accepted premise in the Fifth Circuit, *see Investment Partners v. Glamour Shots Lic., Inc.*, __ F.3d __, 2002 WL 149872, at *2 (5th Cir. July 15, 2002), and the Ninth Circuit, *see Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1247-49 (9th Cir. 1995).

On the other side of the divide, as recently recognized by the Seventh Circuit, are at least the First, Third and Eighth Circuits. Those "[t]hree courts of appeals have held that under *Prima Paint* [*Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967),] the arbitrator determines whether contractual limitations on remedies [in arbitration agreements] are valid." *Metro East Center for Conditioning & Health v. Qwest Commun. Int'l, Inc.*, __ F.3d __, 2002 WL 1378752, at *6 (7th Cir. June 27, 2002) (citing *Werries*, 253 F.3d 1083; *MCI Telecomm. Corp. v. Matrix Commun. Corp.*, 135 F.3d 27 (1st Cir. 1998); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3rd Cir. 1997)).



The Eighth Circuit reached this holding (as discussed above) in *Werries*. It recently reaffirmed this holding in *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536, 539 (8th Cir. 2002).

The First Circuit held that arbitrators, not district courts, initially decide what remedies are available in arbitration in *MCI*. The First Circuit reasoned:

> Equally unavailing is Matrix's new contention that the Agent Agreement's arbitration clause is invalid because the Tariff arbitration rules foreclose remedies, such as multiple damages, to which it is entitled. Putting aside the question of waiver, this argument must be brought to the arbitrator because it does not go to the arbitrability of the claims but only to the nature of the available relief. *See Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 230-31 (3rd Cir. 1997) [parenthetical omitted]; *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 599 (1st Cir. 1996) [parenthetical omitted]. Matrix's reliance on *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1994), is misplaced because, unlike the plaintiffs there, Matrix's claims are not brought under a statute specifically designed to protect bargaining rights. The applicable precedent in our circuit is instead that parties may contract to limit remedies in arbitration. *See Raytheon Co. v. Automated Bus. Sys.*, 882 F.2d 6, 12 (1st Cir. 1989); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60-62, 115 S.Ct. 1212, 1217-19, 131 L.Ed.2d 76 (1995) [parenthetical omitted].

*MCI*, 135 F.3d at 33 n.12.

The Third Circuit held that arbitrators, not district courts, initially decide what remedies are available in arbitration in *Great Western*, a case that served as the foundation for both *Werries*, *see* 253 F.3d at 1085-86, and *MCI*, *see* 135 F.3d at 33 n.12. In *Great Western*, the plaintiff argued that her arbitration agreement was invalid because, among other reasons, it "deprive[d her] of ... punitive damages." 110 F.3d at 226. The Third Circuit approached this argument by first setting forth the proper division of authority between district courts and arbitrators:

> Under the FAA the district court must be satisfied that the parties entered into a valid arbitration agreement. In conducting this inquiry the district court decides only whether there was an agreement to arbitrate, and if so, whether the agreement is valid. In so deciding, the district court is not to consider the merits of the claims giving rise to the controversy, but is only to determine, as we have stated, whether there is a valid agreement to arbitrate. Once such an agreement is found, the merits of the controversy are left for disposition to the arbitrator. Moreover, there is a strong presumption in favor of arbitration, and doubts "concerning the scope of arbitrable issues should be resolved in favor of arbitration."

*Id.* at 228 (citations and footnotes omitted).

After laying this groundwork, the Third Circuit rejected the plaintiff's argument that the (alleged) prohibition on



punitive damages in her arbitration agreement allowed her to avoid arbitration:

> The availability of punitive damages is not relevant to the nature of the forum in which [the plaintiff's] complaint will be heard. Thus, the availability of punitive damages cannot enter into a decision to compel arbitration. [The New Jersey Law Against Discrimination] provides that a victim of unlawful discrimination may be awarded punitive damages, but the issue of whether this right has been waived is separate and apart from the issue of whether an employee has agreed to an arbitral forum, and hence, is for the arbitrator to decide.

*Id.* at 232 (citations omitted).

Finally, the Seventh Circuit also appears to be in accord with the First, Third and Eighth Circuits. Like the First Circuit, the Seventh Circuit has held that contracting parties have the right to prohibit the award of punitive damages in arbitration by express agreement. *See Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709-10 (7th Cir. 1994). That Circuit has also recognized that parties generally can waive statutory rights as part of their arbitration agreements absent a federal statutory provision to the contrary. *See Metro East*, 2002 WL 1378752, at *5. These precedents strongly suggest that a district court in the Seventh Circuit cannot refuse to compel arbitration simply because an arbitration agreement prohibits an arbitrator from

awarding punitive damages or otherwise limits the arbitrator's remedial powers.[6]

In sum, there is a clear and mature split among the Circuits over who first decides the meaning and significance of a damages limitation contained in an arbitration agreement: Is it a district court when deciding whether to compel arbitration, or is it an arbitrator during arbitration proceedings (subject, of course, to district court review when the arbitrator's award is being enforced)?[7] The Court should grant this petition and resolve this irretractable Circuit split.

### C. The Court Of Appeals' Decision Cannot Be Reconciled With Opinions From The First, Second, Third, Fifth And Eighth Circuits.

As explained in the preceding section, the Court of Appeals' primary holding – that a district court can deny a

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[6] In *McCaskill v. SCI Mgmt. Corp.*, 285 F.3d 623 (7th Cir. 2002), the Seventh Circuit initially held that a district court could deny arbitration of a Title VII claim if the relevant agreement did not allow an arbitrator to award attorneys' fees, but the Seventh Circuit vacated that opinion days before *Metro East* was published. *See* 294 F.3d 879 (7th Cir. 2002).

[7] On which side of the divide the D.C. Circuit falls is unclear. In *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997), the D.C. Circuit implied, but did not hold, that a district court could refuse to compel arbitration of a Title VII claim if an arbitration agreement limited the Title VII remedies that a plaintiff could obtain. In an earlier case, however, the D.C. Circuit held that a district court cannot refuse to compel arbitration on public policy grounds: "In sum, if parties have validly agreed to submit a dispute to arbitration, we see no reason not to enforce that agreement. If the arbitrator construes the contract so as to require someone to commit an illegal act, a court can then refuse to enforce the arbitrator's decision. A court cannot, however, bypass the arbitration process simply because a public policy issue might arise." *National R.R. Passenger Corp. v. Consolidated Rail Corp.*, 892 F.2d 1066, 1071 (D.C. Cir. 1990).



motion to compel arbitration based on its belief that the remedies available in arbitration are inadequate – cannot be reconciled with published opinions from the First, Third and Eighth Circuits. *See Arkcom Digital*, 289 F.3d at 539; *Werries*, 253 F.3d at 1086; *MCI*, 135 F.3d at 33 n.12; *Great Western*, 110 F.3d at 232. In addition, the Court of Appeals' subsidiary holding – that an arbitration agreement barring punitive damages provides inadequate remedies to a RICO plaintiff – further conflicts with published opinions from the Second and Fifth Circuits.

In *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1356-58 (2nd Cir. 1993), the defendants moved to dismiss securities and RICO claims brought by investor plaintiffs because those plaintiffs had agreed by contract to resolve all claims through arbitration in England. The plaintiffs opposed the dismissal by claiming, among other things, that the arbitration would be inadequate due to the fact that an English arbitrator could not award them RICO trebled damages. The Second Circuit summarily rejected this view:

> That RICO provides treble damages and seeks to deter persistent misconduct does not dissuade us from our view that the [plaintiffs'] contract clauses must be enforced. As we have explained, the [plaintiffs] have adequate potential remedies in England and there are significant disincentives to deter English issuers from unfairly exploiting American investors. Although the remedies and disincentives might be magnified by the application of RICO, we cannot say that application of English law would subvert the policies underlying that statute.

996 F.2d at 1366.[8] Under *Roby*, a plaintiff in the Second Circuit can be required to resolve her disputes in arbitration even if that arbitration does not allow her to recover RICO trebled damages; that same RICO plaintiff in the Eleventh Circuit, however, can escape arbitration under the Court of Appeals' *In re Humana* decision. Such a difference in outcomes is unacceptable.

The Court of Appeals' decision even more directly clashes with the Fifth Circuit's recent *Investment Partners* decision. Similar to Plaintiffs here, the *Investment Partners* plaintiff claimed that it should not have to arbitrate a federal cause of action allowing for trebled damages (in that case, a Clayton Act claim) because its arbitration agreement stated that "arbitrators shall not award punitive damages." 2002 WL 1498721, at *1. The Fifth Circuit agreed with the Court of Appeals that it was for a district court, not an arbitrator, to decide initially whether the remedies available in arbitration were adequate. *See id.* at *2. Thereafter, however, the Fifth Circuit held – in direct conflict with *In re Humana* – that the plaintiff nevertheless had to arbitrate its Clayton Act claims because "the prohibition in the parties' arbitration agreement against awarding 'punitive damages' does not extend to [bar the award of] statutory treble damages" for two reasons:

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[8] *Roby* is consistent with the view this Court expressed of RICO's trebled damages remedy in *McMahon*. There Justice O'Connor reasoned that RICO trebled damages were designed to be an "incentiv[e] for plaintiffs to pursue RICO claims that would advance society's fight against organized crime. But in fact RICO actions are seldom asserted 'against the archetypical, intimidating mobster.' The special incentives necessary to encourage civil enforcement actions against organized crime do not support nonarbitrability of run-of-the-mill civil RICO claims brought against legitimate enterprises." *McMahon*, 482 U.S. at 241-42 (citations omitted).



> First, the task in this case is to construe "punitive" in a private parties' arbitration agreement, which the Supreme Court has clearly said we interpret broadly to permit arbitration as far as possible. Second, it makes sense to draw the distinction, from the standpoint of the parties' expectations when they entered the arbitration agreement, between statutory treble damages and common law punitive damages. That is, punitive damages are awarded under notoriously open-ended legal standards and a broadly defined constitutional limit concerning the amount awarded. Treble damages, however, represent a mere mathematical expansion of the actual damages calculated by the arbitrator. While private parties might well exclude common law punitive damages, with all their uncertainty, from the arbitrator's authority, the riskiness of committing antitrust damages to the arbitrator is much smaller. Thus, antitrust treble damages may indeed be "punitive" simply because they exceed the actual damages that have been inflicted on the victim of violative conduct, but they are not "punitive" for purposes of interpreting the scope of an arbitration clause.

*Id.* at *3.

Following *Investment Partners*, if a plaintiff wants to sue a defendant for violating RICO but has an arbitration agreement with the defendant barring punitive damages, the validity and effect of that agreement changes dramatically as she travels across the country looking for a place to file suit: If she sues the defendant in Little Rock, Arkansas (in the Eighth Circuit), she will be required to arbitrate her RICO claim and the arbitrator will decide whether she can recover

RICO trebled damages; if she sues in Oxford, Mississippi (in the Fifth Circuit), she will again be required to arbitrate her RICO claim, but the arbitrator will have to allow her to recover RICO trebled damages; finally, if she sues in Birmingham, Alabama (in the Eleventh Circuit), she will be able to litigate her RICO claim in court and will be allowed to recover RICO trebled damages in court. *Compare Werries*, 253 F.3d at 1086 (Eighth Circuit) *with Investment Partners*, 2002 WL 1498721, at *2-3 (Fifth Circuit) *with In re Humana*, 285 F.3d at 973-74 & n.3 (Eleventh Circuit) (adopting District Court's opinion). Because such disparities can only promote intolerable forum shopping by plaintiffs, this Court should intercede to remedy this imbalance.

### D. The Court Of Appeals' Decision Undermines The Critical Role That The FAA Plays In Promoting Alternative Dispute Resolution.

Even if there were not a mature split among the Circuits over the question presented by this petition, the Court of Appeals' decision would still merit review by this Court because it is a dangerous precedent antithetical to the effective operation of the FAA for the following reasons:

1. An unspoken, but necessary, assumption underlying the Court of Appeals' decision is that a federal court can decide that certain statutory rights cannot be waived in arbitration even when the legislative body that created the rights did not make them unwaivable. Only by embracing this assumption could the Court of Appeals hold that Plaintiffs were not required to arbitrate their RICO claims despite the facts that (1) Plaintiffs agreed to arbitrate their disputes, including statutory disputes, with PacifiCare and United under arbitration agreements that expressly limited remedies in arbitration, and (2) no provision of RICO



suggests that its rights and remedies are unwaivable.

The Court of Appeals' assumption, however, is incompatible with this Court's precedents broadly recognizing the authority of private parties to waive statutory rights. *See United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) ("absent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties"). As the Seventh Circuit noted in *Metro East*:

> As far as we know, the Supreme Court has never held that *any* entitlement is outside the domain of contract, unless the statute forbids waiver (as §206 of the Communications Act does not). Every day criminal defendants waive the most fundamental rights, such as the right to jury trial and proof beyond a reasonable doubt, in exchange for lower sentences or other benefits. *See United States v. Krilich*, 159 F.3d 1020 (7th Cir. 1998) (collecting authority). Public employees can and do waive constitutional rights – including the right of political speech – in exchange for employment. *See, e.g., CSC v. Letter Carriers*, 413 U.S. 548 (1973); *Snepp v. United States*, 444 U.S. 507 (1980). Political candidates can [even] surrender some of their speech rights in exchange for a federal subsidy. *See Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976).

*Metro East*, 2002 WL 137852, at *5 (emphasis in original). *See also Mitsubishi*, 473 U.S. at 628 ("Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue").

By concluding that federal courts can override the decisions of private parties to forego certain rights or remedies as part of an arbitration agreement, the Court of Appeals has undermined a basic premise of the FAA – that parties can contract to resolve their disputes in arbitration on such terms as they see fit. *See Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989).[9] This interference is troublesome in its own right, but it is made all the more troublesome in the context of this case. The arbitration agreement that binds Dr. Book and PacifiCare, to take one example, is an agreement between *commercial* actors that allows all parties to receive the *full range of compensatory relief* in arbitration (so that they can be "made whole") but also frees *all parties* (including Dr. Book and his affiliated doctors) from the risk of having punitive damages assessed against them. There is no reason that commercial actors should not be allowed to resolve their commercial disputes without resort to punitive damages, but that is exactly the outcome outlawed by the

[9] This Court has remarked that "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi*, 473 U.S. at 628). *See also McMahon*, 482 U.S. at 242 (stating that litigants can "effectively vindicate their RICO claim in an arbitral forum"). But it does not follow from this general proposition, which explains why statutory claims are generally arbitrable, that a party may *never* agree to waive statutory remedies as part of a valid agreement to arbitrate, or as the Court of Appeals phrased it in an earlier decision, that "the arbitrability of [statutory] claims rests on the assumption that the arbitration clause permits relief equivalent to court remedies." *Paladino*, 134 F.3d at 1062. The Court has never reached that much broader holding, which would require a special exception in the arbitration context from the rule that parties may validly agree to relinquish statutory rights. Such an exception would be wholly anomalous given that the arbitration setting is one deeply rooted in, and indeed premised on, private agreement. *See Mitsubishi*, 473 U.S. at 625.



Court of Appeals, in contravention of this Court's precedents. *Cf. Mastrobuono*, 514 U.S. at 58 (whether a claim for punitive damages is arbitrable "comes down to *what the contract has to say* about the arbitrability of … [a] claim for punitive damages" (emphasis added)).[10]

**2.** This case also highlights well the danger of allowing district courts to resolve, at the motion to compel arbitration stage, whether damages limitations in an arbitration agreement are enforceable. No arbitration agreement at issue here expressly limits either trebled damages or RICO remedies; instead, all but one of the agreements simply prohibit arbitrators from awarding "punitive damages," while the remaining agreement does not allow an arbitrator to award "extracontractual damages" (which United explained to the Court of Appeals did not restrict an arbitrator's ability to award remedies on statutory causes of action).

Interpreting the meaning of these arbitration provisions, of course, is a task uniquely suited for the decisionmaker whom the parties selected to resolve their disputes – namely, a duly appointed arbitrator. To refuse arbitration in this case, however, the District Court and the Court of Appeals were required to usurp the arbitrator's authority and grant to themselves the power to decide whether RICO trebled damages were "punitive" or "extracontractual." Moreover, they were required to exercise this power without knowing whether Plaintiffs even have a legitimate claim against PacifiCare or United for RICO trebled damages (which cannot be known until the

[10] The District Court expressly found as a factual matter that the parties to the instant dispute are sophisticated actors. *See* 132 F. Supp.2d at 998. Sophisticated commercial actors should be given considerable latitude in structuring their relationships and allocating risks.

appropriate decisionmaker – *i.e.*, an arbitrator – addresses the merits of whether PacifiCare or United violated RICO). Nothing in this Court's precedents supports this outcome; to the contrary, the outcome is inconsistent with the Court's decision in *John Wiley & Sons v. Livingston*, 376 U.S. 543, 557 (1964), which held that "[o]nce it is determined … that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."

**3.** As if the above reasons were not enough to show how the Court of Appeals' decision endangers effective, uniform enforcement of the FAA, an additional flaw taints the decision. In holding that Plaintiffs did not have to arbitrate their RICO claims, neither the District Court nor the Court of Appeals required Plaintiffs to make any showing whatsoever that they would be unable to vindicate their rights in arbitration; the courts simply assumed Plaintiffs could not do so and thus released Plaintiffs from their binding commitments to arbitrate with PacifiCare and United. Just two Terms ago, however, this Court (in reviewing another arbitration decision by the Eleventh Circuit) clearly instructed federal and State courts that the party seeking to escape arbitration under the FAA bears the burden of proving that an arbitration agreement is invalid in the specific context of that party's dispute. *See Green Tree Fina. Corp. v. Randolph*, 531 U.S. 79, 91-92 (2000). By presuming both (a) that the PacifiCare and United arbitration agreements prohibited RICO trebled damages when no agreement expressly so stated, and (b) that this prohibition crippled Plaintiffs' ability to obtain adequate RICO relief, when no Plaintiff offered proof to this effect, the District Court and the Court of Appeals turned *Green Tree* on its head. *See also McMahon*, 482 U.S. at 227 ("The



burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue").[11]

When confronted with a motion to compel arbitration of statutory claims, a federal court conducts a simple and straightforward analysis: It first asks "Is there an agreement to arbitrate between the parties that covers the statutory claims?" If so, it then asks "Is there any external legal constraint that forecloses arbitration of the claims?" *See Green Tree*, 531 U.S. at 90; *Gilmer*, 500 U.S. at 26; *Mitsubishi*, 473 U.S. at 627-28. Here, the District Court found (and the Court of Appeals agreed when it adopted the District Court's opinion) that Plaintiffs had arbitration agreements with PacifiCare and United and that those agreements covered Plaintiffs' RICO claims. This Court has settled the issue that Congress has not imposed a legal constraint against arbitrating RICO claims, *see McMahon*, 482 U.S. at 242, and the District Court did not find any "grounds as exist at law or in equity for the revocation of any contract" (9 U.S.C. §2) that voided the parties' arbitration agreements. *See* 132 F. Supp.2d at 997-1000. At this point, the FAA-mandated analysis was complete and Plaintiffs' RICO claims should have been sent to arbitration. That the District Court and Court of Appeals did not stop there and instead grafted a third prong to the FAA analysis – "Are the

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[11] Relieving Plaintiffs of this burden is especially unwarranted in this case because Plaintiffs conceded on appeal that they will not pursue any claim sent to arbitration, including the RICO claims of other defendants that the District Court ordered to arbitration. *See, e.g.*, Appellees' Br. in 11th Circuit Appeal No. 01-10247-CC, at 21 ("Plaintiffs are not going forward with any claim referred to arbitration"). Plaintiffs should not be allowed to avoid arbitration by contending that arbitral remedies are inadequate when they have no intention of going forward with arbitration regardless of the available remedies.

parties' agreed-to remedies adequate?" – turns the otherwise administrable question of whether to compel arbitration into a judicial quagmire. It forces judges to decide what remedies an arbitration agreement permits, how those remedies apply to a plaintiff's claims,[12] and whether those remedies are somehow "adequate."[13] Bogging down motions to compel arbitration with such issues rather than leaving them to be addressed in the first instance by the arbitrator charged with resolving the parties' disputes destroys the twin goals of the FAA (to put arbitration agreements on par with other contracts and to promote their efficient enforcement). *See Gilmer*, 500 U.S. at 24.

### E. At A Minimum, This Petition Should Be Held Pending The Court's Decision In Howsam v. Dean Witter Reynolds, Inc.

The question presented in this case addresses a pure question of law relating to the proper allocation of authority between a district court and an arbitrator: "Whether a district court must compel arbitration of a plaintiff's RICO claims under a valid arbitration agreement even if that agreement does not allow an arbitrator to award punitive damages, leaving to the arbitrator in the first instance the decision of what remedies are available to the RICO plaintiff in arbitration." Page i, *supra*. This question parallels the

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[12] *Compare Investment Partners*, 2002 WL 1498721, at *3 (arbitration clause not allowing for recovery of punitive damages still allows for recovery of trebled damages) *with In re Humana*, 285 F.3d at 973-74 & n.3 (arbitration clause not allowing for recovery of punitive damages also does not allow for recovery of trebled damages).

[13] *Compare Roby*, 996 F.2d at 1366 (arbitration provides for "adequate potential remedies" even if it does not allow for recovery of RICO trebled damages) *with In re Humana*, 285 F.3d at 973-74 & n.3 (arbitration remedies not adequate if they do not allow for recovery of RICO trebled damages).



question presented in *Howsam v. Dean Witter Reynolds, Inc.*, No. 01-800: "[*W*]*hether a court or the arbitrators should decide* if claims are eligible for arbitration under a self-regulatory organization's arbitration code provision that '[n]o dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy'" (emphasis added).

This Court granted the petition for certiorari to review *Howsam* (a decision by the Tenth Circuit) on February 25, 2002 and will decide *Howsam* during the October 2002 Term. The Court's decision will inevitably address the proper allocation of authority between a court asked to compel arbitration versus an arbitrator selected by the parties to arbitrate their substantive disputes. If the Court reverses the Tenth Circuit's judgment in *Howsam*, its rationale will almost certainly require the reversal of the judgment by the Court of Appeals in *In re Humana* as well. *Howsam*, after all, involves a question of whether a court or an arbitrator decides if a plaintiff's claim is time-barred, which is an issue normally addressed *before* a decisionmaker reaches the merits of a dispute. If a court at the motion to compel stage is required to leave such an issue to an arbitrator to decide, the court also must leave for an arbitrator the issue of whether the parties' agreed-to remedies are adequate, since that issue can only be addressed *after* a decisionmaker reaches (and resolves) the merits of a dispute.

If this Court is not inclined to grant the current petition based on the reasons set forth in the preceding sections, then at the least the Court should hold this petition until it resolves *Howsam*. When the Court's resolution of a case already set for argument is likely to address issues germane to a pending petition for certiorari, it is consistent with Court

practice to hold the petition until the Court decides the case and thereafter to grant the petition, vacate the judgment on which the petition is based, and remand the matter to the court that originally issued the judgment for reconsideration in light of the Court's recent decision. *See* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 192-93 (7th ed. 1993). The Court should follow this well-charted course here if it believes that full review of the Court of Appeals' decision is unnecessary.

## III. CONCLUSION.

For the foregoing reasons, Petitioners PacifiCare Health Systems, Inc., PacifiCare Operations, Inc., United HealthCare, Inc. and UnitedHealth Group Incorporated respectfully requests that this Court grant this petition and issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review its judgment in *In re Humana Inc. Managed Care Litigation*. Alternatively, Petitioners respectfully request that this Court hold this petition pending its decision in *Howsam v. Dean Witter Reynolds, Inc.*, No. 01-800, and, after that decision is issued, grant this petition, vacate the Court of Appeals' judgment, and remand this matter to the Court of Appeals for further proceedings consistent with *Howsam*.



DATED: August 6, 2002.

Respectfully Submitted,

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# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-10247 & 01-12596

In re: HUMANA INC. MANAGED CARE LITIGATION

Price Plaintiffs, Price, Sessa, Katz & Yingling, Sandra Johnson, Patricia Freyre, Regina Joi Price, Anthony Sessa, Arnold Katz, et al.,
Plaintiffs-Appellees,

v.

Humana Insurance Company, Coventry Health Care of Georgia, Inc., f.k.a. Principal Health Care of Georgia, Inc., Principal Health Care, Inc., et al.,
Defendants,

PacifiCare Health Systems, Inc., PacifiCare Operations, Inc., United Health Care, United Health Group, Foundation Health Systems, Inc., Wellpoint Health Networks, Inc., Prudential Insurance Company of America,
Defendants-Appellants.

Leonard J. Klay, M.D., Price Plaintiffs, Price, Sessa, Katz & Yingling, Sandra Johnson, Patricia Freyre, Regina Joi Price, Anthony Sessa, Arnold Katz, et al.,
Plaintiffs-Appellees,

v.

Humana, Inc., et al.,
Defendants,

PacifiCare Health Systems, Inc., PacifiCare Operations, Inc.,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida.

Filed March 14, 2002

Before BARKETT, FAY and WINTER,* Circuit Judges.

BARKETT, Circuit Judge:

The Defendants appeal the district court's order granting in part and denying in part their motion to compel arbitration. In this case, a group of doctors, acting on behalf of themselves and others similarly situated, have sued several HMOs on various grounds– including RICO, ERISA, quantum meruit, breach of contract, federal clean claim payment regulations, unjust enrichment, and state prompt pay statutes. The suit is made particularly complicated by the wide array of different relationships among the various parties in the action, relationships that we need not elaborate here beyond noting the following: some of the doctors had contracts with some of the HMOs; some of those contracts had arbitration clauses; and some of those arbitration clauses placed limitations on the sort of damages an arbitrator may award.[1] The task facing the district court was, in short, to

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* Honorable Ralph K. Winter, U.S. Circuit Judge for the Second Circuit, sitting by designation.

1 For example, plaintiff Dr. Breen is suing Prudential, PacifiCare, and United, among other defendants. Breen has contracts with Prudential and PacifiCare, but not with United. Breen's contract with Prudential contains an arbitration clause that allows a party to arbitrate a claim that "arises out of or relates to this agreement or its terms." Breen's contract with PacifiCare contains a similar clause, with the additional proviso "that punitive damages shall not be awarded." Breen has no contract with United (although plaintiffs Porth and Kelly do).



determine which of the various legal claims must be resolved through arbitration.

The district court made four rulings related to this appeal. First, the court held that claims between plaintiffs and defendants who are both signatories to contracts containing enforceable arbitration clauses must be arbitrated.[2] Second, relying primarily on our opinion in *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998), the court found that those arbitration clauses that exclude punitive damages are unenforceable in this suit because they preclude recovery of treble damages under RICO; therefore, an HMO may not compel arbitration of a RICO suit under such an arbitration clause.[3] Third, the court determined that an HMO may not invoke its arbitration clause to compel arbitration of an aiding-and-abetting charge regarding a doctor's contractual rights with a different HMO.[4] Fourth, the court held that exceptions to the general rule that a non-party to a contract may not invoke the contract – exceptions we described in *MS Dealer Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999) – do not apply in the present case; thus an HMO that is not a signatory to a

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2 Thus, following the above example, Breen's suit against Prudential must be arbitrated.

3 Again following the above example, PacifiCare may not compel Breen to arbitrate his RICO claim against PacifiCare because the contract between them prevents the arbitrator from awarding punitive damages.

4 This means, for example, that Prudential may not compel Breen to arbitrate a claim in which Breen alleges that Prudential conspired with PacifiCare to impair PacifiCare's contractual obligations to Breen (i.e., concerning care of Breen's patients covered under a PacifiCare plan). However, Prudential may compel Breen to arbitrate his claims related to its own contractual relationship with Breen (*i.e.*, regarding Breen's patients covered under a Prudential plan).

particular contract may not invoke that contract's arbitration clause to compel arbitration.[5]

We affirm in its entirety the district court's order for the reasons set forth in its comprehensive opinion found at 132 F.Supp.2d 989 (S.D. Fla. 2000). We agree that under the circumstances here *MS Dealer* does not compel application of equitable estoppel. In *MS Dealer*, the plaintiff, Franklin, bought a car pursuant to a "Buyers Contract" with Jim Burke Motors. The Buyers Contract incorporated by reference a retail installment contract, in which Franklin was charged $990.00 for a service contract through MS Dealer. Franklin subsequently sued both Jim Burke and MS Dealer for conspiracy and fraud. MS Dealer, a nonsignatory to the Buyers Contract, attempted to invoke that contract's arbitration clause to compel arbitration. Noting that "there are certain limited exceptions, such as equitable estoppel, that allow[ ] non signatories to a contract to compel arbitration," this Court found that MS Dealer could compel arbitration. *Id.* at 947. In discussing those exceptions, *MS Dealer* relied primarily on *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (11th Cir. 1993) and *Boyd v. Homes of Legend, Inc.*, 981 F.Supp. 1423 (M.D. Ala. 1997).

In *Sunkist*, the plaintiff, Sunkist Growers, Inc. (SGI), sought to avoid arbitration as provided by the contractual agreement between SGI and Sunkist Soft Drinks, Inc. (SSD). Subsequent to the agreement between the SGI and SSD, Del Monte purchased SSD. When SGI sued Del Monte over the terms of the agreement between SGI and SSD, Del Monte

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[5] This means, for example, that in Breen's suit against Prudential, PacifiCare and United, United may not compel Breen to arbitrate based on his enforceable arbitration provision with Prudential.



sought arbitration pursuant to that agreement. SGI argued that Del Monte could not compel arbitration because it was not a signatory to the contract. This Court held that SGI was equitably estopped from avoiding arbitration because SGI was suing under the same contract that provided for arbitration and, thus, should not be permitted to rely on some contractual terms but avoid others. *Sunkist* at 758. We noted that Del Monte was the parent company of SSD, and that after the purchase of SSD, Del Monte had ceased operating it as an independent enterprise. *Id.* Thus, the direct nexus between all of SGI's claims and the agreement as well as the integral relationship between SSD and Del Monte led us to conclude that SGI's claims were intimately founded in and intertwined with the agreement, and the plaintiff was thus equitably estopped from denying the non-signatory defendant's right to compel arbitration. *Id.*

In *Boyd*, plaintiffs purchased mobile homes from several mobile home dealers, homes which had been manufactured by Homes of Legend (Homes). The purchases were made pursuant to retail installment and security agreements between the plaintiffs and the dealers, agreements that contained arbitration clauses. Homes was not a party to nor mentioned in these contracts for sale. The plaintiffs sued Homes, *inter alia*, for breach of their written express warranties on the mobile homes, alleging defects in materials and workmanship. They also alleged that their homes were covered under a myriad of state and federal consumer warranties– including implied and non-written warranties of merchantability, habitability, and freedom from defects– and that Homes' conduct violated the those warranties as well as the consumer protection provisions of the Magnuson-Moss Act. Some plaintiffs also sued the dealers. Homes attempted to compel arbitration based on the

arbitration clauses in the retail installment contracts between the various plaintiffs and dealers.

The *Boyd* court ruled that Homes could not compel arbitration by invoking plaintiffs' arbitration agreements with the dealers, in part, because plaintiffs did not "advance the theory that the [dealer] defendants acted as Homes of Legend's front in committing the alleged frauds," but, rather, "pursue[d] parallel claims of fraudulent conduct against two separate commercial entities who have common, but decidedly distinct, duties toward them ...." *Boyd* at 1434. *Boyd* observed that this scenario was completely distinct from two previous cases in which it had applied equitable estoppel:

> In both instances, this court applied the doctrine of equitable estoppel, concluding that the plaintiffs' allegations of such pre-arranged, collusive behavior established that their claims against the insurers were intimately founded in and intertwined with the obligations imposed by the underlying loan agreements . . . . In *Staples*, this court emphasized that the plaintiff's "claims against the [the insurers were] derivative of, and predicated on, her claims against [the lender]; if she had no claim against [the lender], she had no claim against [the insurers]." 936 F.Supp. at 859. In *Roberson*, this court emphasized that the holding was a result of the plaintiffs' allegations of "common breaches of duties by all defendants working hand-in-hand," essentially acting on behalf of each other to commit a common and



> conspiratorial fraud. 954 F.Supp. at 1522, 1529.

*Boyd* at 1433.

In *Sunkist*, because the plaintiff's claims against the nonsignatory defendant were based upon, and inextricably intertwined with, the written agreement of the parties, we compelled arbitration. In *Boyd*, the plaintiff's causes of action against Homes were based on duties separate and apart from those arising out of the retail installment contract between the plaintiffs and the dealers, and did not allege collusion between the defendants to defraud the plaintiffs as to the terms of that contract. Thus, the nonsignatory defendant was not entitled to compel arbitration. Applying *Sunkist* and *Boyd*, *MS Dealer* concluded that defendant MS Dealer could invoke equitable estoppel to compel arbitration of plaintiff Franklin's suit, because "each of [Franklin's] fraud and conspiracy claims depend[ed] entirely upon her contractual obligation to pay $990.00 for the service contract," *MS Dealer* at 948, and moreover because

> [Franklin] specifically alleges that MS Dealer worked hand-in-hand with Jim Burke ... in this alleged fraudulent scheme. Her "allegations or such pre- arranged, collusive behavior establish[ ] that [her] claims against [MS Dealer are] intimately founded in and intertwined with the obligations imposed by the [Buyers Order]."

*Id.* (quoting *Boyd* at 1433).

A plaintiff's allegations of collusive behavior between the signatory and nonsignatory parties to the contract do not

automatically compel a court to order arbitration of all of the plaintiff's claims against the nonsignatory defendant; rather, such allegations support an application of estoppel only when they "establish[ ] that [the] claims against [the nonsignatory are] intimately founded in and intertwined with the obligations imposed by the [contract containing the arbitration clause]." *Id.* The HMOs nonetheless direct our attention to more general language from *MS Dealer*, which notes that equitable estoppel may be appropriate "when the signatory [to the contract containing the arbitration clause] raises allegations of . . . substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." *Id.* (quoting *Boyd* at 1433). The HMOs contend that this language mandates an application of equitable estoppel in this case simply because the doctors allege a RICO conspiracy.

This contention is only tenable if the passage is read completely out of context. *MS Dealer* "is not a rigid test, and each case turns on its facts." *Hill v. G E Power Systems, Inc.*, __ F.3d __ (5th Cir. 2002) (holding that district court did not abuse its discretion in declining to apply doctrine of equitable estoppel even though complaint alleged collusive scheme to defraud). In all cases, "'the lynchpin for equitable estoppel is equity,' and the point of applying it to compel arbitration is to prevent a situation that 'would fly in the face of fairness.'" *Id.* at ___ (quoting *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000)). The purpose of the doctrine is to prevent a plaintiff from, in effect, trying to have his cake and eat it too; that is, from "rely[ing] on the contract when it works to [his] advantage [by establishing the claim], and repudiat[ing] it when it works to [his] disadvantage [by requiring arbitration]." *Tepper Realty Co. v. Mosaic Tile Co.*, 259 F.Supp. 688, 692



(S.D.N.Y. 1966). The plaintiff's actual dependence on the underlying contract in making out the claim against the nonsignatory defendant is therefore always the *sine qua non* of an appropriate situation for applying equitable estoppel.

In light of the foregoing, we agree with the district court that the present RICO suit does not present an appropriate circumstance for equitable estoppel, and even if we did not agree, we would be hard pressed to identify any abuse of discretion in the court's decision to forego application of the doctrine. *See Grigson* at 528 ("whether to utilize equitable estoppel in this fashion is within the district court's discretion; we review to determine only whether it has been abused."). Here, the doctors' suit does not rely upon or presume the existence of an underlying contract; the RICO claims in this case are based on a statutory remedy Congress has provided to any person injured as a result of illegal racketeering activities.[6] This remedy stands apart from any available remedies for breach of contract, and clearly is not "intimately founded in and intertwined with the underlying contract obligations." *McBro Planning and Development Co. v. Triangle Const. Co., Inc.*, 741 F.2d 342, 344 (11th Cir. 1984) (quoting *Hughes Masonry Co. v. Greater Clark County School Bldg. Corp.*, 659 F.2d 836, 841 n.9 (7th Cir. 1981)). Thus, the doctors in the present suit are not effectively "attempting to hold [a non-signatory HMO] to the terms of [a signatory HMO's] agreement." *Hughes Masonry* at 838.

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[6] 18 U.S.C. § 1964(c) provides, in relevant part, that " Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee ...."

Moreover, although the doctors in this case do claim fraudulent collusive behavior by the HMOs, they make no suggestion that the contracts containing arbitration clauses are themselves the product of, or in any way related to, the HMO's conspiratorial behavior. This situation is different from *MS Dealer*, in which the plaintiffs alleged that the signatory and nonsignatory defendants had colluded to defraud by including an excessively expensive installment contract in a buyers order (sharing in the illicit profits), and the only claims against the nonsignatory defendant were related to that retail installment contract. In contrast, here the alleged fraudulent scheme does not differentiate between doctors with contracts and those without, and the RICO claims are unrelated to any of the contractual relationships that exist between the doctors and the HMOs. Therefore, the fact that the doctors' complaint alleges a RICO conspiracy provides no basis in equity for allowing a nonsignatory HMO to avail itself of an arbitration agreement that a coconspirator signatory HMO happens to have with a plaintiff doctor.

AFFIRMED.



United States District Court
Southern District of Florida
Miami Division

In re: MANAGED CARE LITIGATION
This Document Relates To All Cases.

No. MDL 1334
No. 00-1334-MD

Filed Dec. 11, 2000

**ORDER GRANTING IN PART AND DENYING IN PART VARIOUS DEFENDANTS' MOTIONS TO COMPEL ARBITRATION**

MORENO, District Judge.

This multi-district litigation involves two separate categories of plaintiffs who have filed suit against various insurance companies that provide managed care. One group of plaintiffs consists of subscribers (patients) who allege causes of action against managed care companies under RICO, ERISA, and common law civil conspiracy. The other group of plaintiffs consists of providers (doctors) who allege causes of action against managed care companies under various legal theories, including RICO, ERISA, *quantum meruit*, breach of contract, federal clean claim payment regulations, unjust enrichment, and state prompt pay statutes.

Certain defendants seek to compel certain plaintiffs to arbitrate the issues raised in this lawsuit, based upon arbitration clauses contained in the contracts that form the basis of the plaintiffs' claims. This Order shall determine

which plaintiffs are bound by contract to use arbitration as the forum to resolve certain claims asserted against certain managed care companies.

## WHETHER TO COMPEL ARBITRATION

### I. THRESHOLD MATTERS TO BE RESOLVED PRIOR TO ANALYZING EACH ARBITRATION CLAUSE

Prior to deciding each of the defendants' motions to compel arbitration individually, the Court must address certain threshold matters that relate to all of the motions to compel arbitration. These are: (A) the Federal Arbitration Act's (the "FAA's" or the "Act's") strong presumption in favor of arbitration, (B) whether ERISA claims may be arbitrated, (C) whether allegations of conspiracy and aiding and abetting may be arbitrated, absent a contract to arbitrate between the parties, (D) whether a nonsignatory to an arbitration clause may be compelled to arbitrate due to the relationship between the nonsignatory and a signatory to the arbitration agreement, (E) the impact of the Eleventh Circuit decisions in *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054 (11th Cir.1998), and *Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149 (11th Cir.1999) *rev'd in part Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000), (F) whether class action implications affect whether to compel arbitration, and (G) whether the doctrine of unconscionability is useful in determining the validity of the arbitration clauses at issue. After addressing each of these matters, the Court shall analyze each motion to compel separately to determine which, if any, claims must be arbitrated.



#### A. The Federal Arbitration Act's Presumption in Favor of Arbitration

Section 4 of the FAA provides in relevant part:

> A party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement.... [T]he court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4.

The FAA establishes a strong federal policy in favor of arbitration and creates "a body of substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the act." *Moses H. Cone Memorial Hosp. v. Mercury Contr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). The scope of the Act's provisions concerning the validity of arbitration clauses reaches to the farthest limits of Congress' power under the Commerce Clause. *Paladino*, 134 F.3d at 1060. There is no dispute that the defendants in this action are engaged in interstate commerce, and accordingly, the Act applies to the present motions to compel arbitration.

Section 2 of the FAA provides that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As the Supreme Court in *Cone* instructs, this language reflects "a liberal federal policy favoring arbitration agreements,

notwithstanding any state substantive or procedural policies to the contrary." *Cone*, 460 U.S. at 24, 103 S.Ct. 927. "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration...." *Id.* at 24-25, 103 S.Ct. 927.

The strong federal policy in favor of arbitration applies to statutory claims with equal force. *E.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). If the plaintiffs' allegations "touch matters" covered by the arbitration agreement, then those claims must be arbitrated, irrespective of how the allegations are labeled. *Id.* at 625 n. 13. This approach furthers the Act's strong presumption in favor of arbitration. *Id.* at 626, 105 S.Ct. 3346 ("[T]he parties' intentions control, but those intentions are generously construed as to issues of arbitrability.").

**B. Whether ERISA Claims Are Subject to Arbitration**

The first threshold issue presented by the various motions to compel arbitration, raised in both provider and subscriber track motions to compel, is whether ERISA claims may be arbitrated. While the Supreme Court has ruled that RICO and antitrust claims are subject to arbitration, *Shearson/American Express v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987) (holding RICO claims arbitrable); *Mitsubishi*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (holding antitrust claims arbitrable), there has been no such determination with respect to ERISA claims. The Eleventh Circuit has not yet ruled upon the issue, but many circuit courts have ruled that ERISA claims are arbitrable. *Williams v. Imhoff*, 203 F.3d 758 (10th Cir.2000); *Kramer v. Smith Barney*, 80 F.3d 1080 (5th



Cir.1996); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110 (3rd Cir.1993); *Bird v. Shearson Lehman/American Express, Inc.*, 926 F.2d 116 (2nd Cir.1991); *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds*, 847 F.2d 475 (8th Cir.1988).

Plaintiffs argue that the Eleventh Circuit would follow the Ninth Circuit decision, *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir.1984), which holds that ERISA claims are not arbitrable. The *Amaro* ruling rests upon the assumption that "[a]rbitrators, many of whom are not lawyers, ... lack the competence to interpret and apply statutes as Congress intended." *Id.* at 750 (citation omitted).

This Court rejects the plaintiffs' argument and finds that ERISA claims are subject to arbitration, in view of the Act's strong presumption in favor of arbitration discussed above. The Court also finds persuasive Supreme Court rulings finding that arbitration is an appropriate forum for RICO and antitrust injuries to be vindicated. An arbitrator can resolve ERISA claims with the same skill, precision, and competence as RICO or antitrust claims. Moreover, there is no language in ERISA that leads to a finding that Congress did not intend to have ERISA claims arbitrated.

The limiting factor with respect to this ruling that ERISA claims are subject to arbitration is that the arbitration clause at issue must afford the plaintiffs the opportunity of meaningful relief in an arbitration proceeding. *Paladino*, 134 F.3d at 1062. This limiting factor will be addressed below in Section I(E), where the Court will address the impact of two Eleventh Circuit decisions, *Paladino* and *Randolph*, upon the instant motions to compel arbitration. This limiting factor also will be addressed with respect to

certain arbitration clauses individually in Section II of this Order.

### C. Whether Allegations of Conspiracy and Aiding and Abetting May Be Arbitrated Where There is No Contract to Arbitrate Between the Parties

The next threshold issue presented by both subscriber and provider track motions to compel arbitration is whether conspiracy and aiding and abetting allegations may be arbitrated where there is no contract to arbitrate between the parties. This scenario occurs, for example, where Plaintiff A sues Defendants B, C, and D alleging conspiracy to violate 18 U.S.C. § 1962(a) and (c) in violation of 18 U.S.C. § 1962(d), and for seeking to aid and abet and for aiding and abetting violations of 18 U.S.C. § 1962(a) and (c) within the meaning of 18 U.S.C. § 2. Plaintiff A has agreed to resolve such claims with Defendant B through arbitration, but has no contractual relationship with Defendants C and D – who have no relation to Defendant B except that all three defendants are separate operators of separate managed care companies.

Plaintiffs posit that there can be no arbitration of the conspiracy and aiding and abetting claims against nonsignatories (Defendants C and D in the above example) because the plaintiffs have not contracted with these parties to arbitrate such disputes. *E.g., Morewitz v. West of England,* 62 F.3d 1356, 1363 (11th Cir.1995) (*quoting In re Talbott Big Foot, Inc.,* 887 F.2d 611, 612 (5th Cir.1989) ("We are unaware of any federal policy that favors arbitration for parties who have not contractually bound themselves to arbitrate their disputes.")). Defendants argue that these claims must be arbitrated, relying upon the



Eleventh Circuit reasoning in *MS Dealer Service Corp. v. Franklin,* 177 F.3d 942 (11th Cir.1999).

Notwithstanding the general rule that only parties who agree to arbitrate may be compelled to do so, the Eleventh Circuit has ruled that there exist limited circumstances where a matter will be compelled to arbitration, absent a signed agreement between the parties. *Id.* at 947 (*citing Sunkist Soft Drinks, Inc. v. Sunkist Growers Inc.,* 10 F.3d 753 (11th Cir.1993)). These are: (1) equitable estoppel, (2) agency or related principles concerning signatory defendants and nonsignatory defendants, and (3) third party beneficiary relationships. *MS Dealer*, 177 F.3d at 947.

Defendants' reliance on *MS Dealer*, where the court found equitable estoppel existed, is misplaced. That case involved a consumer transaction where Ms. Franklin executed a "Buyers Order" to purchase a vehicle from Jim Burke Motors, Inc. The Buyers Order incorporated by reference a Retail Installment Contract, which Ms. Franklin purchased for $990.00, and also contained a valid arbitration clause. Ms. Franklin filed suit after purchasing the car, asserting claims for breach of contract, breach of warranty, fraud, and civil conspiracy between signatory defendant Jim Burke Motors Inc. and nonsignatory defendant MS Dealer. Among other allegations, Ms. Franklin claimed that both parties shared in the excessive profits from the Retail Installment Contract. The only claims asserted against MS Dealer related to the Retail Installment Contract. MS Dealer moved to compel arbitration, based upon the Buyers Order arbitration clause, and Ms. Franklin objected on the ground that there was no signed agreement to arbitrate between herself and MS Dealer. *Id.* at 944-45.

The *MS Dealer* court found that Ms. Franklin was equitably estopped from objecting to arbitration of the dispute under both circumstances where equitable estoppel arises. First, equitable estoppel arises where a signatory to a written agreement must rely on the terms of the agreement in asserting its claims against the nonsignatory. *Id.* at 947 (*citing Sunkist*, 10 F.3d at 757). Under this form of equitable estoppel, there also must be a close relationship between nonsignatory and signatory defendants, which did exist between signatory defendant Jim Burke Motors Inc. and nonsignatory defendant *MS Dealer*. *See Sunkist*, 10 F.3d at 757. Second, equitable estoppel applies where there is interdependence and concerted misconduct between the nonsignatory and signatory defendants. Otherwise, the arbitration proceeding between the two signatories would be rendered meaningless and the federal policy in favor of arbitration thwarted. *MS Dealer*, 177 F.3d at 947.

In the instant action, the plaintiffs allege violations against parties bound to arbitrate ("signatories") and seek to hold nonsignatories liable for conspiracy and aiding and abetting. Some signatory defendants have valid arbitration clauses that will be enforced, while other signatory defendants will litigate before the undersigned either for lack of an arbitration agreement or an invalid arbitration agreement. The issue before the Court is whether the nonsignatory defendants may compel arbitration, relying upon the doctrine of equitable estoppel.

With respect to the first way to find equitable estoppel discussed above, there is a distinguishing factor between this case and *MS Dealer* and *Sunkist*; namely, the relationship between signatory defendants and nonsignatory defendants. In *MS Dealer*, the defendants worked in concert to sell vehicles with retail installment contracts included in the



purchase agreement for the vehicle. In *Sunkist*, which involved licensing issues, the nonsignatory, Del Monte, acquired all of the stock of signatory Sunkist Soft Drinks. The instant action is distinguishable because the signatory managed care company and nonsignatory manage care companies do not have the requisite "close relationship" needed to find equitable estoppel. *Sunkist*, 10 F.3d at 757.

With respect to the second way to find equitable estoppel, this Court finds the doctrine inapplicable to the current action. The *MS Dealer* court was concerned with thwarting the FAA by a scenario where the nonsignatory defendant would litigate the same action in federal court that the signatory defendant would arbitrate concurrently. The present action is much more complex, involving many more parties. The concern that the FAA will be thwarted does not exist in the present scenario. In fact, this Court is painstakingly following the FAA's mandate to arbitrate whatever the parties agree to arbitrate, even though it will lead to concurrent proceedings. While the Court believes that it would be most efficient to have all claims heard either in Federal court or in front of an arbitrator due to the strong likelihood of concurrent proceedings before itself and multiple arbitrators, the Supreme Court has instructed otherwise. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) (holding that Federal Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims, "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums."). As such, the Court will compel arbitration of whichever claims are

deemed arbitrable and retain jurisdiction to hear all other claims.[7]

Here, it is inevitable, based upon this Order, that some signatory defendants will be forced to arbitrate certain claims, while the same claims will be litigated before the undersigned concurrently. This Court will be hearing the same RICO issues (including RICO conspiracy and aiding and abetting by nonsignatories) with respect to defendants that do not have arbitration clauses in their agreements with the plaintiffs, or whose arbitration clauses are ruled invalid. By way of example, Humana either does not have an arbitration clause in its agreements with providers or it does not move to compel arbitration. The plaintiffs allege conspiracy and aiding and abetting against the other named defendants in this action, stemming from Humana's contractual relationship with the plaintiffs. All nonsignatory defendants to the Humana agreements will be forced to defend the conspiracy and aiding and abetting claim in front of the undersigned. Accordingly, this Court does not find the justification necessary (i.e. the thwarting of the FAA) to allow nonsignatories to an arbitration agreement to compel arbitration based upon the doctrine of equitable estoppel.[8]

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[7] Moreover, as the Eleventh Circuit instructs in *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281 (11th Cir.1989), each party shall have individualized arbitration. There shall be no bundling of the various named plaintiffs' claims that this Court deems arbitrable, unless an arbitrator rules otherwise. The Court takes no position on whether any of these arbitrations may become class action arbitrations.

[8] The Court also does not find an agency or third party beneficiary relationship present to compel arbitration between the nonsignatories. *MS Dealer*, 177 F.3d at 947.



**D. Whether a Nonsignatory to an Arbitration Agreement May Be Compelled to Arbitrate**

A related issue concerning nonsignatories to arbitration agreements arises (1) where a plaintiff sues a parent company, concerning an agreement between the plaintiff and the parent's subsidiary (or affiliate), where only the subsidiary has contracted with the litigant to arbitrate; and (2) where a nonsignatory plaintiff sues a signatory defendant, based upon an agreement (that contains an arbitration clause) between the defendant and a third party to whom the plaintiff is affiliated. The principles enumerated by the Eleventh Circuit in *MS Dealer* for justifying a nonsignatory to arbitrate discussed above apply with equal force to these issues, but lead to a different result. *MS Dealer,* 177 F.3d at 947.

The Court finds that under either theory of equitable estoppel, as well as under the agency and third party beneficiary exceptions, a nonsignatory parent should be compelled to arbitrate where either (a) the signatory subsidiary or affiliate is compelled to arbitrate, or (b) the nonsignatory parent benefits from the contractual relations of its subsidiary's relationship with the plaintiffs – irrespective of whether the subsidiary is a party to the lawsuit. Likewise, the Court finds that a nonsignatory plaintiff is bound to arbitrate disputes against a signatory defendant, where the plaintiff brings suit based upon an agreement between the defendant and a third party to whom the defendant is affiliated.

**E. The Impact of the of the Eleventh Circuit Holdings in Paladino and Randolph**

The next issue before the Court is the Eleventh Circuit's rulings in *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir.1998), and *Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149 (11th Cir.1999) *rev'd in part Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000). Not surprisingly, these cases have received quite a bit of attention from the litigants in this action. Based upon the holdings in these two cases, the plaintiffs seek to negate contractual obligations to arbitrate disputes between the parties because the arbitration forum does not provide meaningful relief for the plaintiffs' statutory claims. Defendants argue that the cases are distinguishable and that an arbitration forum can meaningfully resolve all of the plaintiffs' claims.

Despite the FAA's strong presumption in favor of arbitrating all disputes as agreed between the parties, the Eleventh Circuit has refused to permit arbitration of certain statutory disputes under limited circumstances. *See Paladino*, 134 F.3d at 1062 ("[T]he arbitrability of such claims rests on the assumption that the arbitration clause permits relief equivalent to court remedies."). In *Paladino*, the court refused to enforce the parties' employment agreement to arbitrate all disputes between the parties. In relevant part, the arbitration agreement permitted the arbitrator to award damages for breach of contract, but prohibited the arbitrator from awarding any other type of damages. *Id.* at 1056.

The *Paladino* court based its holding on two grounds. First, the court found that the clause prohibiting extra contractual damages denied the plaintiff of any meaningful



relief for her Title VII claims. "This clause defeats the statute's remedial purposes because it insulates Avnet from Title VII damages and equitable relief." *Id.* at 1062. Second, the court found that the statutory policy behind Title VII would be frustrated further by the parties' agreement to arbitrate through the American Arbitration Association ("AAA"), which charges high fees – $2,000 in this case. "[A] clause such as this one that deprives an employee of any hope of meaningful relief, while imposing high costs on the employee, undermines the policies that support Title VII." *Id.*

In *Randolph*, the plaintiff alleged violation of the Truth in Lending Act ("TILA") because the defendant required her to obtain "vendor's single interest" insurance in connection with the financing of the purchase of her mobile home, but did not include the requirement in its TILA disclosure. The arbitration clause in the retail installment agreement governed all disputes between the parties, and granted the arbitrator authority to award money damages, declaratory relief, and injunctive relief. However, the arbitration clause made no mention of what organization shall conduct the arbitration, whether the parties were to share the expenses of the arbitration, or what the filing fees of the arbitration would be. *Randolph*, 178 F.3d at 1151.

In holding the arbitration clause unenforceable, the *Randolph* court was concerned that the plaintiff's statutory rights under TILA would not be vindicated in an arbitration forum due to the exorbitant cost of initiating arbitration as compared to the "small sum" of plaintiff's claims. *Id.* at 1158 ("[T]he arbitration clause ... fail[ed] to provide minimum guarantees required to ensure that Randolph's ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrator's fees, or other high costs of

arbitration."). Perhaps realizing the potentially far reaching effect of its holding, the court distinguished this "small consumer transaction," as well as the employment agreement in *Paladino,* from other contexts, such as commercial franchise agreements. *Id.* at 1159.

The issue before this Court is how these cases relate to both the provider track and subscriber track agreements to arbitrate. Beginning with the provider track plaintiffs, they argue that their statutory rights under RICO and ERISA will not be vindicated in an arbitration forum, and that they will not be able to obtain meaningful statutory relief through arbitration. The burden of establishing this proposition rests with the provider plaintiffs. *Green Tree Fin. Corp. v. Randolph,* 531 U.S. 79, 121 S.Ct. 513, 522, 148 L.Ed.2d 373 (2000); *see also Shearson/American Express,* 482 U.S. at 225-26, 107 S.Ct. 2332.

The issues raised by *Paladino* concerning limitation of an arbitrator's authority to award extra contractual damages will be addressed individually below in Section II, where the Court will determine whether any of the arbitration agreements at issue prevent meaningful relief in an arbitration forum due to a limitation on extra contractual damages.

With respect to the *Randolph* (and to a lesser extent *Paladino*.) concern that steep filing fees and costs of arbitration will prevent meaningful relief through arbitration, the Court declines the provider track plaintiffs' invitation to expand the Eleventh Circuit holdings. The Eleventh Circuit decision in *Randolph* made clear that its holding was limited to small consumer transactions concerning small sums of money, as well as Title VII claims in employment relationships. This Court finds the relationship between



sophisticated groups of doctors and managed care companies, where the doctors contract to provide health care to large groups of patients, quite distinguishable.

Another distinguishing factor between *Randolph* and the instant action is the alleged amount in controversy. In *Randolph*, the amount in controversy was a "small amount" stemming from a failure to disclose a requirement to purchase vendor insurance in connection with the purchase of a mobile home. In the instant action, the provider plaintiffs attempt to persuade the court that their statutory claims are too small to combat the hefty costs of arbitration. This argument is unpersuasive because each provider plaintiff alleges multiple instances of statutory violations over an extended period of time. In aggregate, each provider plaintiff allegedly has suffered considerable harm. These aggregate claims may be arbitrated by each plaintiff who has signed a valid and enforceable arbitration agreement.

Moreover, today the Supreme Court reversed in part the *Randolph* decision, ruling that an arbitration agreement that is silent with respect to arbitration costs does not render the agreement unenforceable. *Green Tree Fin. Corp. v. Randolph,* 531 U.S. 79, 121 S.Ct. 513, 521-22, 148 L.Ed.2d 373 (2000) ("The 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidating of an arbitration agreement."). While the Supreme Court did acknowledge that "the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum[,]" *id.* at 10, the Court was "mindful of the FAA's purpose to reverse the longstanding judicial hostility to arbitration agreements and to place arbitration agreements upon the same footing as other contracts." *Id.* at 9 (quotation and citation omitted).

In total, the doctors are sophisticated individuals, not consumers alleging TILA violations in connection with the purchase of a mobile home or employees suing under Title VII. The Court is unpersuaded that the provider track plaintiffs' statutory claims will not be vindicated in an arbitration forum due to excessive filing fees and costs. *Green Tree Fin. Corp.*, 531 U.S. 79, 121 S.Ct. 513, 522, 148 L.Ed.2d 373 (stating that the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration); *see also Williams v. Cigna*, 197 F.3d 752, 763-64 (5th Cir.1999) (enforcing arbitration clause absent evidence that plaintiff cannot afford to pay half the filing fees). To rule otherwise would expand the Eleventh Circuit's holdings and frustrate the FAA's strong presumption in favor of arbitration.

In contrast, the subscriber plaintiffs are in a better position to argue that their claims are analogous to the consumer transaction or employment relationships addressed by the Eleventh Circuit. The subscriber plaintiffs are individuals who have contracted, through their employer, to receive managed care from the defendants. They allege statutory violations stemming from being overcharged for the price of their managed care due to misrepresentations and omissions. Because there is only one subscriber defendant who seeks to compel arbitration, it is most efficient for the Court to acknowledge the potential analogy, and determine whether Plaintiff Hitsman may avail herself of the *Randolph* holding now. (All other issues concerning Plaintiff Hitsman's arbitration clause will be addressed below in Section III.)

Plaintiff Hitsman argues that her agreement to arbitrate disputes with PacifiCare-Oklahoma will deny her the ability to vindicate her statutory claims. However, in contrast to the



*Randolph* arbitration agreement that did not discuss which organization would arbitrate or how costs would be shared, Plaintiff Hitsman's arbitration agreement is governed by JAMS/Endispute and states that the fees and expenses of the arbitrator and neutral administrator will be divided equally. The filing fee for a JAMS/Endispute arbitration is $250. Accordingly, the concerns raised in *Randolph* involving steep filing fees and uncertainty as to whom shall bear the brunt of these unknown fees do not exist here. Moreover, the Court is unpersuaded that the amount in controversy for Plaintiff Hitsman is such a "small sum" as the plaintiff's injury in *Randolph*. Plaintiff Hitsman has failed to meet her burden on this point, as well as her burden of establishing that her statutory rights will not be vindicated in an arbitration forum due to excessive filing fees. The *Randolph* holding will not assist Plaintiff Hitsman in opposing the motion to compel arbitration.

### F. Whether Class Action Implications Affect Whether to Compel Arbitration

The next issue concerning both subscriber and provider cases concerns the potential that this Court may certify this case as a class action. Named plaintiffs who may be forced to arbitrate their claims seek to prevent arbitration on the ground that this multi-district litigation is a class action, and that other, unnamed plaintiffs will surface who are not required to arbitrate. Following this argument, the Court should not compel arbitration for the named plaintiffs who agreed to arbitrate.

This argument is misguided. The Court is only concerned with deciding the issues before it presently, not the issues of hypothetical plaintiffs in a potential class action lawsuit. *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct.

669, 38 L.Ed.2d 674 (1974). If other plaintiffs come forward who are not bound by an agreement to arbitrate, the Court will address such issue when ripe.

Moreover, class action allegations do not prevent the named plaintiffs from being forced to compel arbitration when such plaintiffs have agreed to arbitrate all of their disputes with the defendants. *Caudle v. American Arbitration Ass'n,* 230 F.3d 920 (7th Cir. 2000) ("A procedural device aggregating multiple persons' claims in litigation does not entitle anyone to be in litigation; a contract promising to arbitrate the dispute removes the person from those eligible to represent a class of litigants."); *see also Johnson v. West Suburban Bank,* 225 F.3d 366, 368 (3rd Cir. 2000) (holding that arbitration of plaintiff's statutory claims is required even where the arbitration clauses may prevent the bringing of class action lawsuits).

### G. Whether the Doctrine of Unconscionability is Useful in Determining the Validity of the Arbitration Clauses at Issue

Lastly, at oral argument on October 26, 2000, there was discussion of whether the arbitration clauses at issue are unconscionable contracts of adhesion. To prevail on this argument, the plaintiffs must show that the clauses are both procedurally and substantively unconscionable for the clauses to be deemed unenforceable. *Golden v. Mobil Oil Corp.,* 882 F.2d 490, 493 (11th Cir.1989). "Procedural unconscionability exists when the individualized circumstances surrounding the transaction reveal that there was no 'real and voluntary meeting of the minds' of the contracting parties. Substantive unconscionability exists when the terms of the contractual provision are unreasonable and unfair." *Id.* (citations omitted).



Plaintiffs' unconscionability argument must be summarily dismissed because the Court finds there is nothing substantively unconscionable with an arbitration clause *per se. Coleman v. Prudential Bache Securities, Inc.,* 802 F.2d 1350, 1351 (11th Cir.1986) ("[T]here is nothing inherently unfair or oppressive about arbitration clauses."). As discussed above, the Court intends to examine each arbitration clause to determine whether it is enforceable. The Court need not rule upon whether each arbitration clause is substantively unconscionable because an unfair or oppressive clause will not be enforceable under existing Supreme Court and Eleventh Circuit precedent governing arbitration clauses, irrespective of whether the clause is procedurally unconscionable.

With these threshold issues addressed, the Court now examines each of the defendants' motions to compel arbitration.

## II. Analysis Of Individual Arbitration Clauses To Determine Whether To Compel Arbitration In Provider Track Cases

### A. United

UnitedHealthcare, Inc. and UnitedHealth Group Incorporated f/k/a United HealthCare Corporation ("United") seek to compel arbitration of all claims raised by provider plaintiffs Manual Porth, M.D. and Glenn L. Kelly, M.D. With respect to Dr. Porth, the United Defendants proffer a United HealthCare of Florida Medical Group Participation Agreement between United HealthCare of Florida and

Community Orthopaedics and Pain Management, Inc.[9] The arbitration clause provides in relevant part that all matters arising from the agreement shall be arbitrated, but limits the arbitrator's authority by preventing the arbitrator from awarding extra contractual damages, including punitive or exemplary damages. Moreover, the arbitration agreement includes a one year statute of limitations to bring the claims in arbitration once there is written notice of the dispute.

The prohibition on extra contractual damages is precisely the type of arbitration agreement that was found unenforceable in *Paladino*. Such an arbitration agreement prevents Dr. Porth from obtaining any meaningful relief for his statutory claims. Additionally, the one year statute of limitations raises grave concerns that Dr. Porth's statutory claims will not be adjudicated appropriately in an arbitration forum. *Paladino*, 134 F.3d at 1058 (*citing Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir.1994)).

Accordingly, the Court will not compel arbitration of Dr. Porth's claims arising under RICO, ERISA, federal clean claim payment regulations, state prompt pay statutes, unjust enrichment, and state prompt pay statutes. However, the Court is not persuaded that the statute of limitations provision is a strong enough factor, on its own, to overcome the FAA's strong presumption in favor of arbitration. Thus, the Court will compel arbitration of Dr. Porth' breach of contract and *quantum meruit* claims, as these claims, if successful, would lead to contractual damages.

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[9] For the reasons discussed in Section I(D), Dr. Porth may not frustrate the agreement to arbitrate by claiming that he is a nonsignatory to the agreement. Dr. Porth's allegations "touch matters" relating to this arbitration agreement, and Dr. Porth is affiliated with Community Orthopaedics of Pain and Management, Inc. *Mitsubishi*, 473 U.S. at 625 n. 13, 105 S.Ct. 3346; *MS Dealer*, 177 F.3d at 947.



United moves to compel Dr. Kelly to arbitrate based upon a United HealthCare of Colorado, Inc. Physician Participation Agreement between United HealthCare of Colorado and Dr. Kelly.[10] The arbitration provision is identical to the United arbitration agreement discussed above concerning Dr. Porth, except that Dr. Kelly's arbitration clause only prevents the arbitrator from granting punitive or exemplary damages. The arbitrator may award extra contractual damages.

The Court finds that the limitation on punitive or exemplary damages serves as a limitation on the types of statutory claims that may be adjudicated before an arbitrator. *Paladino*, 134 F.3d at 1062 ("[T]he arbitrability of such claims rests on the assumption that the arbitration clause permits relief equivalent to court remedies."). Dr. Kelly alleges RICO violations, which provide for treble damages. Treble damages are a form of punitive damages. *Gentry v. Resolution Trust Corp.*, 937 F.2d 899, 910-11 (3rd Cir.1991); *Pine Ridge Recycling, Inc. v. Butts County*, Georgia, 855 F.Supp. 1264, 1273 (M.D.Ga.1994); *cf. Shearson/American Express*, 482 U.S. at 240-41, 107 S.Ct. 2332 (indicating in dicta that treble damages are primarily remedial and secondarily punitive). The Court also finds that the one year statute of limitations serves the function of limiting the ability for Dr. Kelly to obtain meaningful relief in an arbitration forum for his other statutory claims. Thus, the Court shall only compel arbitration of Dr. Kelly's breach of contract and *quantum meruit* claims.

There is one final contention raised by United that must be addressed. In an effort to compel arbitration and dismiss

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[10] Dr. Kelly's allegations against United "touch matters" relating to this agreement. *Mitsubishi*, 473 U.S. at 625 n. 13, 105 S.Ct. 3346.

the instant action against Drs. Porth and Kelly, United has expressed a willingness to waive the arbitration clauses' limitations that prevent an arbitrator from awarding extra contractual damages and punitive or exemplary damages.[11] Principles of justice and fair play, however, lead to the conclusion that one party unilaterally cannot alter *post litem motam* terms of an agreement so that a case is dismissed. *Cf. Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56-57, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) ("[I]f the contract says 'no punitive damages,' that is the end of the matter, for courts are bound to interpret contracts in accordance with the expressed intentions of the parties – even if the effect of those intentions is to limit arbitration."). The Court rejects United's attempted waiver.

**B. Foundation**

Foundation Health Systems, Inc. ("Foundation") references four agreements that contain arbitration clauses in moving to compel plaintiff Dennis Breen, M.D. to arbitrate. Because three of the four agreements are enforceable, the Court shall compel Dr. Breen to advance all of his claims, except the conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies, in accordance with the parties' contracted arbitration agreement.

Foundation argues that an arbitration clause in the Sutter Agreement, entered into between Health Net and Sutter Independent Physicians as a Participating Medical

[11] No such waiver has been proffered concerning the statute of limitations provisions.



Group, requires that Dr. Breen's claims be arbitrated.[12] This agreement calls for arbitration of all grievances between the parties. Costs are split between the parties, unless assessed differently by an arbitrator. Fees are advanced by the initiating party.

The one potentially objectionable part of this agreement is the mandate that fees are advanced by the initiating party. The initiate fee mandate may result in the concern raised in *Paladino* and *Randolph* that hefty fees would prevent meaningful relief. This concern dissipates because there are two other enforceable arbitration clauses without a provision mandating that the fees be advanced by the initiating party. The Court intends to order arbitration under the other two agreements so that Dr. Breen is not required to advance the fees as the initiating party.

The two other agreements that contain an arbitration clause are: (1) Physicians Services Agreement between Health Net and Foundation Health Systems Affiliates and Dr. Breen, and (2) Champus/Tricare Prime and Extra Professional Provider Agreement between Foundation Health Systems Affiliates and Dr. Breen. The Physicians Services Agreement calls for arbitration of claims arising in tort, contract, or otherwise. The arbitration shall be governed by the California Arbitration Act. The Champus/Tricare Agreement states that any problems or

[12] For the reasons discussed in Section I(D), Dr. Breen may not frustrate the agreement to arbitrate by claiming that he is a nonsignatory to the agreement. Dr. Breen's allegations "touch matters" relating to this arbitration agreement, and Dr. Breen is affiliated with Sutter Independent Physicians. *Mitsubishi*, 473 U.S. at 625 n. 13, 105 S.Ct. 3346; *MS Dealer*, 177 F.3d at 947. Likewise, the Foundation Defendants are bound to this agreement to arbitrate due to their relationship with Health Net.

disputes relating to the agreement are to be arbitrated. The prevailing or substantially prevailing party's costs shall be borne by the other party.

Dr. Breen's allegations against Foundation are interrelated with the Physicians Services Agreement and the Champus/Tricare Agreement. Accordingly, the Court shall compel Dr. Breen to arbitrate all of his claims against Foundation, excluding conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies.

Lastly, for purposes of clarity to the future arbitrator, the Court finds unenforceable the fourth arbitration clause proffered by Foundation, located in the CHW Agreement between Foundation Health Systems Affiliates and CHW Medical Foundation as a Participating Medical Group. This arbitration agreement provides for a six month statute of limitations to bring arbitration, and divests the arbitrator of the ability to award punitive damages. For the various reasons addressed above, an arbitration clause with these limitations is unenforceable. Nonetheless, the Court will compel arbitration based upon the arbitration clauses found in the Physicians Services Agreement and the Champus/Tricare Agreement.

### C. WellPoint

WellPoint Health Networks Inc. ("WellPoint") seeks to compel arbitration of Dr. Breen's allegations against it based upon an arbitration agreement found in a Provider Agreement between Dr. Breen and WellPoint's subsidiary, Blue Cross of California. The arbitration clause provides first for a meet-and-confer process followed by arbitration. The clause governs any problems or disputes concerning the



agreement. The arbitration shall be governed by AAA, and there is no limitation on damages or the types of disputes that may be brought.

The Court finds nothing objectionable with this arbitration clause, in view of the Court's holdings in Section I. Dr. Breen's allegations against WellPoint arise from this agreement. There are no impediments that this Court is aware of that would prevent Dr. Breen from having all of his claims against WellPoint meaningfully resolved in an arbitration forum, except for conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies.

### D. Prudential

Prudential Insurance Company of America ("Prudential") moves to compel arbitration of Dr. Porth's claims against it based upon a Participating Physician Agreement between Dr. Porth and Prudential Health Care Plan, Inc. and/or its affiliates. Dr. Porth opposes this motion on the ground that the arbitration mandate in this agreement is optional. An examination of this arbitration clause indicates that both parties should have proceeded differently in handling this dispute, but ultimately leads to the conclusion that Dr. Porth must follow the dispute resolution procedures agreed upon between the parties. For the reasons discussed below, Dr. Porth must mediate or arbitrate the allegations against Prudential presently before the Court, except for conspiracy and aiding and abetting allegations that stem from contractual relationships with other managed care companies.

Article IX of the Participating Physician Agreement, titled "Arbitration," contains three subsections. Section A

provides that the exclusive methods for resolving disputes concerning the parties' agreement are "negotiation, mediation, and/or arbitration." Section B, "Mediation," states that if a dispute arises and the parties cannot settle the dispute through negotiation, then either party may elect to submit the dispute to a sole mediator. If the parties cannot resolve the dispute within sixty days from the start of mediation, "either party may elect to submit the dispute to binding arbitration." Lastly, Section C, "Arbitration," provides the ground rules for arbitration, none of which lead to a finding that the arbitration clause is unenforceable.

Dr. Porth bases his argument that the arbitration clause is optional on the use of "and/or" language in Section A, as well as the preamble to Section C, which states "If the parties agree to binding arbitration...."

The Court finds that this agreement provides for three different forms of dispute resolution to be the exclusive means for resolving disputes concerning the agreement. The use of "and/or" language in Section A documents that these forms of dispute resolution are options; an aggrieved party is not required by this agreement to avail himself of all three options. Either party may initiate the dispute resolution procedures through negotiation, or both parties can agree at the onset to arbitration. In the present scenario, neither party has elected for negotiation (which would lead to the unilateral power to compel mediation and then arbitration), and both parties do not agree to binding arbitration. Analysis of how both parties chose to proceed is instructive in determining how to resolve Prudential's motion to compel arbitration.

There is no record evidence that suggests that once Dr. Porth filed the instant action, Prudential attempted to



avail itself of the dispute resolution procedures discussed above. Rather, Prudential unilaterally sought to compel arbitration, despite the fact that the arbitration clause requires both parties to agree to arbitrate. The only unilateral power Prudential possessed was to compel mediation after negotiation proved unsuccessful. A more prudent approach for Prudential, based upon the parties' agreement, would have been to initiate negotiation. While negotiation probably would have been futile, it would have given Prudential unilateral power to submit the dispute to mediation. If mediation proved unsuccessful after sixty days, then Prudential would have the unilateral power to force arbitration, as per the parties' agreement.

Likewise, Dr. Porth did not follow the parties' agreed upon dispute resolution procedures. Dr. Porth would have been able to seek redress for all of his claims, excluding the conspiracy and aiding and abetting allegations stemming from contractual relationships with other managed care companies, by following the agreed upon dispute resolution procedures. If negotiations proved futile, Dr. Porth could have unilaterally compelled mediation. If mediation was unsuccessful after sixty days, then Dr. Porth would have had the unilateral power to compel arbitration.

At bottom, both parties agreed to have the aforementioned dispute resolution procedures exclusively govern their disputes. Accordingly, the Court must honor this commitment. Dr. Porth is ordered to follow the agreed procedures to resolve the present dispute, excluding conspiracy and aiding and abetting allegations that stem from contractual relationships with other managed care companies, which this Court retains jurisdiction to hear. Dr. Porth is free to attempt to negotiate. If such negotiation is unsuccessful, Dr. Porth is free to compel mediation or

arbitration. Prudential already has consented to arbitration, but Dr. Porth has the option of mediation or arbitration--as the parties agreement only permits arbitration at this stage of the dispute resolution process by mutual agreement.

**E. CIGNA**

CIGNA Corporation, Connecticut General Corporation, and CIGNA Health Corporation ("CIGNA") move to compel both Drs. Porth and Kelly to arbitrate their disputes with CIGNA. Dr. Porth consented to arbitration in a Physician Managed Care Agreement between Dr. Porth and CIGNA HealthCare of Florida, Inc.[13] Section O(2) of the agreement states that "[a]rbitration shall be the exclusive remedy for the settlement of disputes arising under this Agreement." There is no language limiting the authority of the arbitrator to award damages; fees and costs shall be split between the parties, and AAA governs.

The Court finds that Dr. Porth has agreed to arbitrate the present dispute, and that the arbitration clause does not raise any concerns with respect to its enforceability. There is no reason for this Court to frustrate the parties' agreement. All of Dr. Porth's claims can be meaningfully adjudicated in an arbitration forum, except for conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies, which the Court retains jurisdiction to hear.

With respect to Dr. Kelly, CIGNA proffers two agreements that allegedly contain arbitration clauses in moving to compel arbitration. CIGNA directs the Court's

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[13] Dr. Porth's allegations against CIGNA "touch matters" relating to this agreement. *Mitsubishi*, 473 U.S. at 625 n. 13, 105 S.Ct. 3346.



attention to a Physician Managed Care Agreement between Dr. Kelly and CIGNA HealthCare of Colorado, Inc., and a Specialist Physician Agreement between Dr. Kelly and CIGNA HealthCare of Colorado, Inc.[14]

The Physician Managed Care Agreement contains a dispute resolution section that states that all grievances and complaints between the parties shall be resolved in accordance with the dispute resolution procedures in the applicable Program Requirements. The Program Requirements mandate that the parties negotiate to resolve disputes. If negotiation fails, the parties are referred back to the Physician Managed Care Agreement, which does not give any direction as to how to proceed if negotiation does not resolve the dispute.

The Specialist Physician Agreement does not suffer from the same infirmity. Section G of this agreement states that any dispute that arises concerning this agreement shall be sent to arbitration. AAA governs, and each party pays half the costs of the proceeding.

Thus, the Court is faced with a scenario where the Physician Managed Care Agreement does not require arbitration, while the Specialist Physician Agreement requires arbitration. Accordingly, Dr. Kelley's claims that relate to the Specialist Physician Agreement shall be arbitrated, except for conspiracy and aiding and abetting allegations that stem from contractual relationships with other managed care companies. Dr. Kelly's claims that relate to the Physician Managed Care Agreement may proceed before this Court.

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[14] Dr. Kelly's allegations "touch matters" relating to these agreements. *Mitsubishi*, 473 U.S. at 625 n. 13, 105 S.Ct. 3346.

### F. PacifiCare

PacifiCare Health Systems, Inc. and PacifiCare Operations, Inc. ("PacifiCare") seek to compel Dr. Breen to arbitrate his claims against PacifiCare, and bases its argument on two agreements: (1) Term Sheet between Sutter Health and PacifiCare of California, and (2) PMG Commercial Risk Agreement between Sutter Independent Physicians and PacifiCare of Florida. Dr. Breen counters by arguing that the Term Sheet does not apply to his claims against PacifiCare.

While the Court disagrees with Dr. Breen's contention, this issue is nondispositive of PacifiCare's motion to compel arbitration because the PMG Commercial Risk Agreement contains substantially the same language in its arbitration clause as the Term Sheet's arbitration clause.[15] As such, analysis of the PMG Commercial Risk Agreement will be dispositive of whether Dr. Breen's claims shall be arbitrated or litigated in front of the undersigned.

Both arbitration agreements contain broad language indicating that the parties intended for "any controversy, dispute, or claim arising out of the agreement" to be arbitrated. However, both agreements prohibit the arbitrator from awarding punitive damages. Thus, we are faced with a potential *Paladino* situation, discussed earlier within the context of United's motion to compel arbitration (Section

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[15] For the reasons discussed in Section I(D), Dr. Breen may not frustrate the agreement to arbitrate by claiming that he is a nonsignatory to the PMG Commercial Risk Agreement, or the Term Sheet for that matter. Dr. Porth's allegations "touch matters" relating to both of these arbitration agreements, and he is affiliated with Sutter Independent Physicians. *Mitsubishi*, 473 U.S. at 625 n. 13, 105 S.Ct. 3346; *MS Dealer*, 177 F.3d at 947.



II(A)), where the plaintiff may not be able to obtain meaningful relief for allegations of statutory violations in an arbitration forum. However, this agreement is distinguishable from the United scenario because the PacifiCare agreements do not impose a shortened statute of limitations.

Accordingly, the Court will not compel Dr. Breen to arbitrate his RICO claims against PacifiCare due to the arbitrator's inability to impose punitive (treble) damages. All other statutory and non-statutory claims shall be arbitrated, except for the conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies.

## III. Analysis Of Individual Arbitration Clause To Determine Whether To Compel Arbitration In Subscriber Track Case Involving PacifiCare

PacifiCare Health Systems, Inc. ("PacifiCare") also moves to compel subscriber track plaintiff Debbie Hitsman to arbitrate her claims raised in the instant litigation. PacifiCare bases its argument on an arbitration clause in a Master Group Service Agreement between MCI-WorldCom, Inc. ("MCI") and PacifiCare- Oklahoma. Plaintiff Hitsman, as an MCI employee, became bound by the terms of the agreement when she enrolled in PacifiCare HMO.

The dispute resolution process in the Master Group Service Agreement provides in § 7.01 that a dispute "relating to the performance of this Agreement by PacifiCare and Member" shall first be submitted to an internal dispute resolution process to resolve the dispute in a non-adjudicative setting. § 7.02 provides that any dispute that is not resolved through the dispute resolution process described

in § 7.01 "shall have the matter resolved by binding arbitration by a single arbitrator." JAMS/Endispute shall arbitrate, and its rules shall govern. The fees and expenses of the arbitrator and neutral administrator shall be divided equally among the disputants. Oklahoma law governs, and the Federal Arbitration Act also applies.

Plaintiff Hitsman raises various defenses to enforcement of the arbitration clause: (1) the arbitration clause is invalid under Oklahoma law, (2) the present dispute is beyond the scope of the arbitration clause, (3) ERISA claims are not subject to arbitration, and (4) the clause is unenforceable under *Randolph* and *Paladino*. For the reasons discussed in Sections I(B) and I(E) above, the ERISA and *Randolph* and *Paladino* arguments are rejected.

With respect to the issue of invalidity under Oklahoma law, the Court rejects that argument as well. Plaintiffs rely upon *Cannon v. Lane*, 867 P.2d 1235 (Okla.1993), where the Oklahoma Supreme Court invalidated an arbitration clause in an HMO contract because it was a contract with reference to insurance. Oklahoma law does not permit arbitration of claims between an insurer and the insured, "except where both the insured and insurer are insurance companies." 15 Okla. Stat. §§ 801-18.

In *Cannon*, a state employee sued PacifiCare of Oklahoma for failure to certify him for hemorrhoid surgery. The court relied upon the Oklahoma statute, as well as the common law policy that "agreements to submit future controversies to arbitration are contrary to public policy[,]" in refusing to enforce the arbitration clause. *Id.* at 1238.

The instant action is distinguishable from *Cannon*. That case dealt with Oklahoma state law issues, while this



case deals with federal claims pursuant to the FAA. The Supreme Court has addresses this issue squarely in *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987). In *Perry*, the Court distinguished state laws that concern the validity, revocability, and enforceability of contracts generally, and state laws that take their meaning precisely from the fact that a contract to arbitrate is at issue. The FAA must defer to the former, but preempts the latter. *Id.* at 491, 107 S.Ct. 2520 ("This clear federal policy places § 2 of the [FAA] in unmistakable conflict with California's § 229 requirement that litigants be provided a judicial forum for resolving wage disputes. Therefore, under the Supremacy Clause, the state statute must give way."). For example, a federal court would apply state law regarding duress and inducement in determining the validity of an arbitration clause because it concerns the validity and enforceability of the contract; however, the court would not concern itself with a state law that invalidates a specific class of cases, such as stock fraud or insurance claims. *Id.* at 489, 107 S.Ct. 2520. Accordingly, the Oklahoma statute that prevents arbitration of insurance claims is of no assistance to Ms. Hitsman in the instant action.

Plaintiff's remaining argument, that the dispute is beyond the scope of the arbitration clause, is also rejected. Plaintiff argues, by focusing on the language of § 7.01, that the arbitration clause is limited to the denial of claims relating to the performance of the agreement. § 7.02 only mandates arbitration for disputes "not resolved by the above appeals and dispute resolution processes...." Plaintiff posits that her allegations concerning systemic violations by PacifiCare (that speak to violations of RICO and ERISA) are not covered by the arbitration clause. PacifiCare counters by

highlighting the preamble of § 7.02, "Any claim, controversy, dispute or disagreement...."

The difficulty with Plaintiff's argument is two-fold. First, this Court is not persuaded that the arbitration clause at issue is limited only to denial of claims, particularly in view of the broad, all-encompassing preamble of § 7.02. Second, and perhaps more importantly, the FAA has a presumption in favor of arbitration, as propounded by the Supreme Court. *Moses H. Cone Memo. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). This Court is required to resolve any doubt "concerning the scope of arbitrable issues ... in favor of arbitration...." *Id.* at 24-25, 103 S.Ct. 927. Accordingly, this argument is rejected as well.

The parties entered into a valid arbitration agreement to resolve all disputes concerning the Master Group Service Agreement. Plaintiff must have all of her claims against PacifiCare resolved through arbitration.

## CONCLUSION

Therefore, it is

ADJUDGED that PacifiCare's Motion to Compel Arbitration of Subscriber Track Plaintiff Debbie Hitsman's claims (D.E. No. 76), filed on July 14, 2000, is GRANTED. All of Ms. Hitsman's claims against PacfiCare shall be arbitrated. It is also

ADJUDGED that PacifiCare's Motion to Compel Arbitration of Provider Track Plaintiff Dennis Breen, M.D.'s claims against PacifiCare (D.E. No. 257), filed on September 8, 2000, is GRANTED in part and DENIED in



part. All of Dr. Breen's claims against PacfiCare shall be arbitrated, except for (1) RICO claims and (2) conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies. It is also

ADJUDGED that Prudential's Motion to Compel Arbitration of Provider Track Plaintiff Manual Porth, M.D.'s claims against Prudential (D.E. No. 313), filed on September 22, 2000, is GRANTED in part and DENIED in part. All of Dr. Porth's claims against Prudential shall be arbitrated, except for conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies. It is also

ADJUDGED that Foundation's Motion to Compel Arbitration of Provider Track Plaintiff Dennis Breen, M.D.'s claims against Foundation (D.E. No. 314), filed on September 22, 2000, is GRANTED in part and DENIED in part. All of Dr. Breen's claims against Foundation shall be arbitrated, except for conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies. It is also

ADJUDGED that United's Motion to Compel Arbitration of Provider Track Plaintiffs Manual Porth, M.D.'s and Glen L. Kelly, M.D.'s claims against United (D.E. No. 319), filed on September 22, 2000, is GRANTED in part and DENIED in part. The only claims that shall be arbitrated are Dr. Porth's and Dr. Kelly's claims concerning breach of contract and quantum meruit. All other claims shall be litigated before the undersigned. It is also

ADJUDGED that CIGNA's Motion to Compel Arbitration of Provider Track Plaintiffs Manual Porth, M.D.'s and Glen L. Kelly, M.D.'s claims against CIGNA

(D.E. No. 323), filed on September 26, 2000, is GRANTED in part and DENIED in part. All of Dr. Porth's claims against CIGNA shall be arbitrated, except for conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies. All of Dr. Kelly's claims against CIGNA stemming from the Specialist Physician Agreement shall be arbitrated, except for conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies. However, all of Dr. Kelly's claims against CIGNA stemming from the Physician Managed Care Agreement shall be litigated before the undersigned. It is also

ADJUDGED that WellPoint's Motion to Compel Arbitration of Provider Track Plaintiff Dennis Breen, M.D.'s claims against WellPoint (D.E. No. 457), filed on October 25, 2000, is GRANTED in part and DENIED in part. All of Dr. Breen's claims against WellPoint shall be arbitrated, except for conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies.

DONE AND ORDERED in Chambers at Miami, Florida, this 11th day of December, 2000.



United States District Court
Southern District of Florida
Miami Division

In re: MANAGED CARE LITIGATION
This Document Relates to Provider Track Cases

No. MDL 1334
No. 00-1334-MD

Filed April 26, 2001

**ORDER GRANTING IN PART PACIFICARE'S MOTION TO COMPEL, AND ORDER MODIFYING PRIOR ARBITRATION ORDER CONCERNING FOUNDATION'S MOTION TO COMPEL**

MORENO, District Judge.

THIS MATTER came before the Court upon Defendants PacifiCare Health Systems, Inc. and PacifiCare Operations, Inc.'s ("PacifiCare's") Contingent Supplemental Motion to Compel Arbitration (D.E. No. 888), filed on January 26, 2001.

THE COURT has considered the motion, responses, and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ADJUDGED that the motion is GRANTED in part for the reasons addressed below. It is also

ADJUDGED that the Court's prior arbitration order ("Order") dated December 11, 2000 is MODIFIED with

respect to Foundation's motion to compel arbitration for the reasons addressed below.

In its prior Order, the Court ruled that Dr. Breen's claims against PacifiCare that stem from Dr. Breen's affiliation with Sutter Health through Sutter Independent Physicians (the "Sutter Agreement (PacifiCare)") are to be arbitrated, except for Dr. Breen's RICO claims, as well as his aiding and abetting and conspiracy claims that stem from contractual relationships with other managed care companies. The RICO claims were deemed non-arbitrable because the Sutter Agreement (PacifiCare) prevented the arbitrator from awarding punitive (treble) damages. PacifiCare now has filed a "Contingent Supplement Motion to Compel Arbitration" based upon Dr. Breen's affiliation with Mercy Medical Foundation through Golden State Physicians (the "Mercy Agreement"), as well as for other reasons addressed in Part II.

## I. ARBITRATION OF DR. BREEN'S CLAIMS AGAINST PACIFICARE UNDER MERCY AGREEMENT, AND MODIFICATION OF ORDER CONCERNING FOUNDATION'S MOTION TO COMPEL ARBITRATION

Similar to the Sutter Agreement (PacifiCare), the Mercy Agreement contains an arbitration clause as the means for resolving disputes stemming from that agreement. (Mercy Agreement, § 6.2 (stating that "any dispute or claim between the parties arising out of the interpretation of or performance under the [Mercy] Agreement" shall be arbitrated.)). However, the Mercy Agreement's arbitration clause does not prevent an arbitrator from awarding punitive damages. Thus, PacifiCare moves the Court to compel



Dr. Breen to arbitrate all claims arising out of the Mercy Agreement.[16]

The Court now is presented with a situation where the litigants have entered into two different contracts that contain inconsistent arbitration agreements. The Court was faced with precisely the same scenario in its prior Order with respect to Dr. Kelly's claims against CIGNA, as well as a somewhat similar scenario concerning Dr. Breen and Foundation. After reviewing its prior Order, it appears that the Court did not resolve these two matters consistently. With CIGNA there was a Specialist Physician Agreement ("Specialist Agreement") and a Physician Managed Care Agreement ("Physician Agreement"). The Specialist Agreement mandated arbitration for the majority of Dr. Kelly's claims, while the Physician Agreement did not mandate arbitration. The Court ruled that Dr. Kelly's claims that stem from the Specialist Agreement shall be arbitrated, while his claims that stem from the Physician Agreement shall be litigated before the undersigned.

However, with Foundation and Dr. Breen the Court analyzed four agreements between the litigants: (1) Sutter Agreement between Health Net and Sutter Independent Physicians as a Participating Medical Group ("Sutter Agreement (Foundation)"), (2) Physicians Services Agreement between Health Net and Foundation Health Systems Affiliates and Dr. Breen ("Physicians Services Agreement"), (3) Champus/Tricare Prime and Extra Professional Provider Agreement between Foundation Health Systems Affiliates and Dr. Breen ("Champus/Tricare Agreement"), and (4) CHW Agreement between Foundation

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[16] Except as modified by this Order, the Court incorporates by reference its prior arbitration Order.

Health Systems Affiliates and CHW Medical Foundation as a Participating Medical Group ("CHW Agreement"). The Court expressed concern regarding the provision in the Sutter Agreement (Foundation) that required Dr. Breen to advance the arbitration fees as the initiating party, in view of the Eleventh Circuit's concern that steep filing fees and costs could prevent meaningful relief through arbitration. *Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149 (11th Cir.1999) *rev'd in part Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000). The Court found the arbitration clauses in the Physicians Services Agreement and the Champus/Tricare Agreement to be enforceable and compelled arbitration for all of Dr. Breen's claims, except for aiding and abetting and conspiracy claims that stem from contractual relationships with other managed care companies. The Court did not compel arbitration based upon the Sutter Agreement (Foundation), nor on the CHW Agreement that contained a provision prohibiting the arbitrator from awarding punitive damages and a six month statute of limitations to institute arbitration. But the Court did not, at that time, retain jurisdiction over Dr. Breen's claims that stemmed from the Sutter Agreement (Foundation) and CHW Agreement.

After review of its prior Order and the parties' pleadings concerning PacifiCare's present motion to compel, the Court finds that the approach taken with respect to Dr. Kelly's claims against CIGNA is the correct way to handle instances where the litigants have multiple agreements with inconsistent arbitration clauses. It is axiomatic that parties should only be compelled to arbitrate disputes that the parties have agreed to arbitrate. *E.g., AT & T Tech. v. Communications Workers of Am.*, 475 U.S. 643, 648-49 ("[A]rbitration is a matter of contract and a



party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.") (citation omitted); *Morewitz v. West of England*, 62 F.3d 1356, 1365 (11th Cir.1995) (expressing reluctant to mandate arbitration where the parties did not bargain to do so); *Goldberg v. Bear Stearns & Co.*, 912 F.2d 1418, 1419 (11th Cir.1990) (holding that parties will not be required to arbitrate disputes that they have not agreed to arbitrate, despite federal presumption in favor of arbitration).

Accordingly, Dr. Breen's claims against PacifiCare that stem from the Mercy Agreement, including RICO claims, shall be arbitrated. However, Dr. Breen's RICO claims against PacifiCare that stem from the Sutter Agreement (PacifiCare) shall be litigated before the undersigned, as ruled upon in the Court's prior Order, because the arbitrator may not award punitive damages under that arbitration agreement. This holding has no impact on the Court's prior ruling that aiding and abetting and conspiracy claims lodged against PacifiCare that stem from contractual relationships with other managed care companies are to be litigated before the undersigned.

In view of the Court's holding today, the Court now must modify its prior Order with respect to Foundation's motion to compel arbitration. As discussed above, the Court compelled Dr. Breen to arbitrate all of his claims against Foundation based upon two arbitration agreements. The Court now must analyze the other two arbitration agreements to determine whether to compel arbitration of Dr. Breen's claims that stem from the Sutter Agreement (Foundation) and CHW Agreement.

In view of the Supreme Court's holding in *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000), the Court's

concern regarding the Sutter Agreement (Foundation)'s requirement that Dr. Breen advance the arbitration costs as the initiating party is diminished. Thus, the Court shall compel Dr. Breen to arbitrate all claims that stem from the Sutter Agreement (Foundation). However, the concerns raised in its prior Order regarding the CHW Agreement prevent the Court from compelling arbitration of Dr. Breen's RICO claims that stem from this agreement. As such, the Court will retain jurisdiction to hear Dr. Breen's RICO claims that stem from the CHW Agreement due to the arbitrator's inability to award punitive (treble) damages. All of Dr. Breen's other claims stemming from this agreement shall be arbitrated. This ruling likewise has no impact on the Court's prior holding that aiding and abetting and conspiracy claims lodged against Foundation that stem from contractual relationships with other managed care companies are to be litigated before the undersigned.

## II. WHETHER TO COMPEL ARBITRATION OF DRS. BURGESS, KELLY, BOOK, AND DAVIS' CLAIMS AGAINST PACIFICARE

PacifiCare also files the instant motion to compel arbitration with respect to Drs. Burgess, Kelly, Book, and Davis' claims against PacifiCare. PacifiCare has reviewed its records and now proffers agreements between these doctors and PacifiCare that contain arbitration clauses. As such, any claims lodged against PacifiCare by these doctors that stem from the parties' agreements should be arbitrated. However, a careful review of the Provider Plaintiffs' Consolidated, Amended Complaint (the "Complaint") indicates that, with one exception, none of these doctors have lodged any claims against PacifiCare that stem from the parties' agreements. Rather, these doctors only allegations against PacifiCare concern aiding and abetting and conspiracy claims that stem



from contractual relationships with other managed care companies. Thus, the Court finds no justification to compel arbitration between these doctors and PacifiCare based upon the parties' agreements, which are not at issue in the instant lawsuit.

However, Dr. Book alleges in the Complaint a contractual relationship with PacifiCare, and PacifiCare proffers the parties' Southwest Florida Agreement, which contains an arbitration clause, to support its motion to compel arbitration. This agreement prevents an arbitrator from awarding punitive (treble) damages. Thus, the Court finds this agreement quite similar to the agreement discussed above between PacifiCare and Sutter Health involving Dr. Breen. Accordingly, the Court shall compel arbitration of all of Dr. Book's claims against PacifiCare, except for RICO claims and aiding and abetting and conspiracy claims that stem from contractual relationships with other managed care companies.

Lastly, as is apparent from the Court's rulings today, the Court declines PacifiCare's invitation to revisit the issue of whether the Court should compel arbitration of aiding and abetting and conspiracy allegations that stem from contractual relationships with other managed care companies. These claims shall be litigated before the undersigned, as there is no arbitration agreement between the parties concerning these types of claims and the justification for invoking the doctrine of equitable estoppel is not present here. Moreover, the Court will not stay this lawsuit pending appellate review of a portion of its prior Order or the resolution of any arbitrations that either are occurring presently or may occur in the future.

## III. CONCLUSION

In sum, Dr. Breen's claims against PacifiCare that stem from the Mercy Agreement shall be arbitrated, including RICO claims. The prior arbitration Order is modified so that Dr. Breen's claims against Foundation that stem from the Sutter Agreement (Foundation) shall be arbitrated, but the Court retains jurisdiction to hear Dr. Breen's RICO claims against Foundation that stem from the CHW Agreement. Dr. Book's claims against PacifiCare, except RICO claims and aiding and abetting claims that stem from contractual relationships with other managed care companies, shall be arbitrated. Today's ruling does not impact the Court's prior holding that aiding and abetting and conspiracy claims that stem from contractual relationships with other managed care companies shall be litigated before the undersigned. There shall be no stay of this multi-district litigation while certain defendants appeal the Court's ruling concerning partial denial of motions to compel certain plaintiffs to arbitrate their allegations lodged against them, nor shall there be a stay while certain defendants arbitrate a portion of certain plaintiffs' allegations.

DONE AND ORDERED in Chambers at Miami, Florida, this 25th day of April, 2001.



UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-10247-CC & 01-12596-CC

In re: HUMANA INC. MANAGED CARE LITIGATION

Price Plaintiffs, Price, Sessa, Katz & Yingling, Sandra Johnson, Patricia Freyre, Regina Joi Price, Anthony Sessa, Arnold Katz, et al.,
Plaintiffs-Appellees,

v.

Humana Insurance Company, Coventry Health Care of Georgia, Inc., f.k.a. Principal Health Care of Georgia, Inc., Principal Health Care, Inc., et al.,
Defendants,

PacifiCare Health Systems, Inc., PacifiCare Operations, Inc., United Health Care, United Health Group, Foundation Health Systems, Inc., Wellpoint Health Networks, Inc., Prudential Insurance Company of America,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida.

Filed June 21, 2002

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: BARKETT, FAY and WINTER,* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rule of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

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* Honorable Ralph K. Winter, U.S. Circuit Judge for the Second Circuit, sitting by designation.



## FEDERAL STATUTES INVOLVED IN THIS CASE

**9 U.S.C. §2. Validity, irrevocability, and enforcement of agreements to arbitrate**

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

**9 U.S.C. §4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination**

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the

parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

**18 U.S.C. §1964. Civil remedies**

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the



enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

**ARBITRATION AGREEMENTS BINDING BREEN AND PACIFICARE REFERENCED IN 132 F. SUPP.2D 989.**

Arbitration. Any controversy, dispute or claim arising out of this Agreement which is not resolved pursuant to the Provider Dispute Resolution Procedure specified above shall be resolved by binding arbitration at the request of either Party, in accordance with the Commercial Rules of the American Arbitration Association. Such arbitration shall occur in Sacramento, California, unless the Parties mutually agree to have such proceeding in some other locale. The arbitrator shall apply California substantive law and federal substantive law where state law is preempted. Civil discovery for use in such arbitration may be conducted in accordance with the provisions of California law, and the arbitrator selected shall have the power to enforce the rights, remedies, duties, liabilities and obligations of discovery by the imposition of the same terms, conditions and penalties as can be imposed in like circumstances in a civil action by a court of competent jurisdiction of the State of California. California Civil Code Section 1283.05, the provisions of California law concerning the right to discovery and the use of depositions in arbitration are incorporated herein by reference and made applicable to this Agreement.

The arbitrator shall have the power to grant all legal and equitable remedies and award compensatory damages provided by California law, except that punitive damages shall not be awarded. The arbitrator shall prepare a decision in writing.

Notwithstanding the above, in the event either Medical Group or PacifiCare wishes to obtain injunctive relief or a temporary restraining order, such Party may initiate an action for such relief in a court of general jurisdiction in the State of



California. The decision of the court with respect to the requested injunctive relief or temporary restraining order shall be subject to appeal only as allowed under California law. However, the courts shall not have the authority to review or grant any request or demand for damages.

S.D.Fla. Docket #1000, Ex. A, at pp. 12-13 & Ex. B, at p. 20 (included in 11th Circuit Excerpts of Record for Appeal No. 01-10247-CC).

**ARBITRATION AGREEMENT BINDING BOOK AND PACIFICARE REFERENCED IN 143 F. SUPP.2D 1371.**

**10.03 ARBITRATION** – Any controversy or claim arising out of, or relating to, this Agreement, or the breach thereof, or with respect to any of the documents executed in conjunction herewith, that cannot be resolved through the PacifiCare Provider Grievance Process as spelled out in the PacifiCare Provider Policy and Procedure Manual or that cannot be resolved using the state of Florida's Benefit and Payment Policy, shall be settled by Arbitration in accordance with the commercial rules of the American Arbitration Association. Such arbitration shall occur in Lee County, Florida, unless the parties mutually agree to have such proceeding in some other locale. Civil discovery shall be permitted under the term [sic] of Florida law.

Upon submission of a dispute to the American Arbitration Association, PacifiCare and PHYSICIAN agree to be bound by the rules of procedure and decision of the American Arbitration Association. The arbitrator shall have the power to grant all legal and equitable remedies and award compensatory damages provided by Florida law, but shall not have the power to award punitive damages. The arbitrator shall prepare in writing and provide the parties an

award including factual findings and the legal basis and other reasons on which the award is based. The arbitrator shall not have the power to commit errors of law or legal reasoning. Judgment upon the award rendered may be entered in any court having jurisdiction thereof.

S.D.Fla. Docket #1075, Leal Dec. Ex. A, at p. 20 (included in 11th Circuit Excerpts of Record for Appeal No. 01-12596-CC).

**ARBITRATION AGREEMENT BINDING KELLY AND UNITED REFERENCED IN 132 F. SUPP.2D 989.**

Plan or Payor and Physician will work together in good faith to resolve any disputes about their business relationship. If the parties are unable to resolve the dispute within 30 days following the date one party sent written notice of the dispute to the other party, and if Plan, Physician, or any Payor that has consented in writing to binding arbitration wishes to pursue the dispute, it shall be submitted to binding arbitration in accordance with the rules of the American Arbitration Association. In no event may arbitration be initiated more than one year following the sending of written notice of the dispute. Any arbitration proceeding under this Agreement shall be conducted in Arapahoe County, Colorado. The arbitrators may construe or interpret but shall not vary or ignore the terms of this Agreement, shall have no authority to award any punitive or exemplary damages, and shall be bound by controlling law. If the dispute pertains to a matter which is generally administered by certain Plan procedures, such as credentialing or quality improvement plan, the procedures set forth in that plan must be fully exhausted by Physician before Physician may invoke his or her right to arbitration under this section. The parties acknowledge that because



this Agreement affects interstate commerce the Federal Arbitration Act applies.

S.D.Fla. Docket #321, Ex. C, at §8 (included in 11th Circuit Excerpts of Record for Appeal No. 01-10247-CC).

**ARBITRATION AGREEMENT BINDING PORTH AND UNITED REFERENCED IN 132 F. SUPP.2D 989.**

The parties shall work together in good faith to resolve any disputes about their business relationship. If the parties are unable to resolve the dispute within 30 days following the date one party sent written notice of the dispute to the other party, and if either party wishes to pursue the dispute, it shall be submitted to binding arbitration in accordance with the rules of the American Arbitration Association. In no event may arbitration be initiated more than one year following the sending of written notice of the dispute. Any arbitration proceeding under this Agreement shall be conducted in Dade County, Florida. The arbitrators may construe or interpret but shall not vary or ignore the terms of this Agreement, shall have no authority to award extracontractual damages of any kind, including punitive or exemplary damages, and shall be bound by controlling law. If the dispute pertains to a matter which is generally administered by certain Plan procedures, such as credentialing or quality improvement plan, the procedures set forth in that plan must be fully exhausted by Medical Group before Medical Group may invoke its right to arbitration under this section. The parties acknowledge that because this Agreement affected interstate commerce the Federal Arbitration Act applies.

S.D.Fla. Docket #321, Ex. A, at §8 (included in 11th Circuit Excerpts of Record for Appeal No. 01-10247-CC).